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NO. 81-5698

THE SUPREME COURT OF THE UNITED STATES

October Term 1981

ELMO PATRICK SONNIER,

Petitioner,

-v.-

LOUISIANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. May a common-law wife give consent to the search of her husband's automobile, in which she has no ownership interest and over which she has no control, so as to obviate the need for the search warrant required by the Fourth and Fourteenth Amendments?

II. Is a new sentencing hearing required by the Eighth and Fourteenth Amendments where one of several aggravating circumstances found by the jury and upon which a death sentence is based, is later determined on appeal to be insufficient?

III. Must an instruction be given to the jury, under the Eighth and Fourteenth Amendments, as to the effect of and weight to be given to any mitigating circumstances in the jury's deliberation on whether to recommend the death sentence?

PARTIES

The only parties to this proceeding in the courts below were the petitioner, Elmo Patrick Sonnier, and the respondent State of Louisiana.

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REFERENCE TO THE OPINIONS BELOW

The proceedings and judgments of the trial court are unreported.

The opinion of the Supreme Court of Louisiana, which affirmed petitioner's conviction, but vacated the original sentences and remanded the case for re-sentencing in a new penalty hearing, is reported as State v. Sonnier, 379 So.2d 1336 (La., 1980).

The opinion of the Supreme Court of Louisiana, which subsequently affirmed the new sentences of death imposed upon petitioner after the new sentencing hearing, is reported as State v. Sonnier, 402 So.2d 650 (La., 1981).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The original opinion of the Supreme Court of Louisiana, which affirmed petitioner's conviction, but which remanded the case for re-sentencing, was rendered on January 28, 1980, and rehearing thereon was refused on March 3, 1980.

After re-sentencing, the opinion of the Supreme Court of Louisiana on petitioner's subsequent appeal was rendered on June 22, 1981, and rehearing thereon was denied on September 4, 1981.

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fourth, Eighth and Fourteenth Amendments to the United States Constitution.

2. This case also involves certain statutory provisions of the State of Louisiana, which are set forth in the appendix

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hereto, at pp. 1a-3a.

STATEMENT OF THE CASE

The facts surrounding the commission of the crimes herein are set forth in the opinions of the Supreme Court of Louisiana, contained in the appendix hereto, at pp. 4a-62a.

The facts concerning the issue of the search of petitioner's automobile are as follows:

On December 1, 1977, a search warrant was issued for the search of the "residence and surrounding premises" of petitioner, and which authorized the seizure of, among other things, an "early 1960's blue Dodge Dart automobile belonging to Elmo Patrick Sonnier." Appendix, pp. 65a-67a.

Helen Sonnier, petitioner's common law wife,[1] had rented the house to be searched. Record of No. 63293, pp. 463-66. Sheriff's deputies came to the house on December 1, 1977, to execute the warrant. Helen Sonnier signed a "Permission To Search" form [Appendix, p. 64a], and the deputies then proceeded to search the house. Helen Sonnier was asked for permission to search the automobile in question, which was then parked (and locked) outside the house. She replied that she did not have the keys to the automobile. The deputies proceeded to break into the car and searched the passenger compartment, purportedly under the authority of the warrant. Record of No. 63293, pp. 479-80. A wrecker was summoned to tow the vehicle away. Record of No. 63293, p. 484.

The vehicle was towed to the courthouse parking lot, and left there. One week later, on December 6, 1977, without any additional warrant or consent to search, deputies entered the trunk of the vehicle, and seized additional evidence. Appendix,

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1. Louisiana does not recognize common-law marriages contracted within the state. The term "common law wife" as used herein is a euphemism.

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p. 70a.

The petitioner filed a pre-trial motion to suppress the evidence [Appendix, p. 71a], contending that the search of the automobile was supported neither by a warrant or by consent validly given. The trial court held that the vehicle search was not supported by the warrant, but rather was supported by the consent of Helen Sonnier. Record of No. 63293, pp. 539-40. Items seized in the vehicle were subsequently admitted into evidence at trial.

Petitioner was tried on two counts of first degree murder, found guilty of both, and was sentenced to death on both counts. On his first appeal, the Supreme Court of Louisiana affirmed the convictions, but, finding an improper instruction to the jury during the sentencing phase, remanded the case for a new sentencing hearing. Appendix, pp. 4a-40a.

At the second sentencing hearing, the jury again recommended the death sentence, and petitioner was sentenced accordingly. Appendix, pp. 90a-95a. On petitioner's subsequent appeal, the new sentenced were affirmed. Appendix, pp. 41a-62a.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

I. The question of the validity of the consent to search the vehicle was raised in the trial court through a motion to suppress [Appendix, p. 71a], in which petitioner contended that "the search and seizure was made in violation of defendant's constitutional guaranteed rights under Amendment Four (4) of the United States Constitution . . .". The trial court denied the motion to suppress.

The issue was presented on appeal to the Louisiana Supreme Court, as Assignment of Error No. 4. The Louisiana Supreme Court dismissed this argument without extensive discussion, noting merely that the issue did not present any question not

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governed by well established principles of law. Appendix, at p. 24a. In the application for rehearing, petitioner contended that "he has been denied due process and equal protection of the law, which is afforded him by the United States Constitution . . ., all as more fully set forth in Assignment of Errors No. 1-13 . . ." Appendix, at p. 75a. Rehearing was granted on another issue, with no further discussion by the court of the Fourth Amendment problem.

II. The question of whether a new sentencing hearing is required by an appellate determination of one of several aggravating circumstances being insufficient was not raised in the trial court, because the issue did not arise until the Supreme Court of Louisiana made the determination. The issue could not have been presented to the trial court because it did not then exist at that stage of the proceeding.

This question involves the action, or failure to act, of the Louisiana Supreme Court. That court recognized that the evidence did not support the finding by the jury that the crimes were committed in an "especially heinous" manner. This was one of several aggravating circumstances found to exist by the jury. Though the Louisiana Supreme Court found the evidence insufficient to support this circumstance, the court declined to order a new sentencing hearing. Appendix, at p. 56a.

Petitioner complained of this in an application for rehearing [Appendix, at p. 85a], contending that because of the same, "the sentence of death imposed upon the defendant is in violation of . . . the Eighth and Fourteenth Amendments to the United States Constitution." Rehearing was refused without comment.

III. The issue of an instruction on the effect of and weight to be given to mitigating circumstances was raised in the trial court, through a requested jury instruction [Appendix,

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p. 86a] which was denied.

Petitioner filed a motion for a new trial [Appendix, pp. 87a-88a], claiming that the death sentence ". . .is excessive, not warranted under the circumstances, and therefore is contrary to . . . the Constitution of the United States of America," for the reason that, inter alia, "the jury . . . has misapplied the law and the facts and has failed to take into consideration the mitigating circumstances of this matter." The motion for a new trial was denied. Appendix, p. 93a.

The question was then presented to the Supreme Court of Louisiana, which found no merit to the argument. Appendix, at pp. 49a-50a. In application for rehearing, petitioner complained that the instruction on mitigation, given in the absence of the requested instruction, failed to give the jury any guidance on the effect of mitigating circumstances, beyond merely telling the jury that such circumstances must be considered. For this reason, petitioner contended that the sentence of death was arbitrary and in violation of the Eighth and Fourteenth Amendments. Appendix, pp. 83a, 85a. Rehearing was refused without comment.

ARGUMENT

I. THERE WAS NO VALID WARRANT FOR THE SEARCH OF PETITIONER'S VEHICLE, AND NO VALID CONSENT THERETO, SO THAT THE SEARCH VIOLATED THE FOURTH AND FOURTEENTH AMENDMENTS.

The search of the automobile herein is predicated by the State solely upon the consent thereto by Helen Sonnier. The evidence shows that Helen Sonnier was petitioner's "common law wife." However, Louisiana does not recognize common law marriages contracted within that state. See, e.g., Liberty Mutual Insurance Company v. Caesar, 345 So.2d 64 (La.App., 3rd Cir., 1977), writ refused, 347 So.2d 1118 (La., 1977). Thus, there was no legally cognizable relation between petitioner and Helen Sonnier.

The vehicle in question, while located on the premises

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rented by Helen Sonnier, was not actually under her control: the car was locked, and she did not have the keys. There was absolutely no evidence presented to suggest that Helen Sonnier had authority to consent to a search of the vehicle. The State's showing in this regard consisted of the mere fact that Helen Sonnier consented. Whether she had the right or authority to consent was not mentioned.

The decision in this case is in apparent conflict with the holding in United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988 (1974). The issue in the Matlock case was whether the defendant's living companion had the right to consent to the search of a house they jointly occupied. This Court held

> "[W]hen the prosecution seeks to justify a warrantless search by proof of voluntary consent, it is not limited to proof that consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164, 171, 94 S.Ct. 988, 993 (1974).
>
> "The authority which justifies the third-party consent . . . rests rather on mutual use of the property by persons generally having joint access or control for most purposes . . ." Ibid., 415 U.S. at 171, n. 7; 94 S.Ct. at 993, n. 7.

In the Matlock case, there was evidence offered to show joint control, if the same could not be implied from the parties' living arrangements. In the instant case we deal not with a dwelling and its inhabitants, but rather with an automobile; and the only evidence as to Helen Sonnier's control thereof is that it was locked and she did not have the keys. This evidence does not bespeak any authority or control on the part of Helen Sonnier.

The burden of proof on the question of valid consent rests with the State. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041 (1973), cited in United States v. Matlock, 415 U.S. 164, 165, 94 S.Ct. 988, 990 (1974). That burden has clearly not been discharged.

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Beyond this, there is yet another apparent violation of petitioner's Fourth Amendment rights. Petitioner's automobile was towed in on December 1, 1977, and was placed in the courthouse parking lot near the sheriff's office. There it remained for some six days, after which deputies, without a warrant, opened the trunk of the car and a green briefcase was found. The procedure of this search, and the items found, are all set forth on a supplemental return on the earlier search warrant. Appendix, p. 70a.

The car sat on the parking lot, in the sheriff's custody, for six days, during which time court was in session with judges available to sign a search warrant, just a few steps away. There were certainly no exigent circumstances to render the obtaining of a proper warrant impractical. The circumstances were obviously not a "now or never" situation in which the evidence might disappear if not immediately seized. See, e.g., Roaden v. Kentucky, 413 U.S. 496, 93 S.Ct. 2796 (1973). Indeed, the six-day wait seems to indicate no particular need for haste.

The State has advanced no proof whatsoever of exigent circumstances justifying the December 6 warrantless search of the vehicle. Thus the entry into the trunk of the car violated petitioner's Fourth Amendment rights.

But there is yet a third violation of the Fourth Amendment. The unjustified and warrantless search of the trunk of petitioner's vehicle produced a green briefcase, which was then opened. Appendix, p. 70a. Independent of the validity or invalidity of the automobile search, the search of this briefcase was illegal.

> "The only question, therefore, is whether the police, rather than immediately searching the suitcase without a warrant, should have taken it, along with respondent, to the police station and there obtained a warrant for the search. A lawful search of luggage generally may be performed only pursuant to a warrant.
> * * *
> "A closed suitcase in the trunk of an automobile may be as mobile as the vehicle in which it rides.

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> But . . . the exigency of mobility must be assessed at the point immediately before the search--after the police have seized the object to be searched and have it securely within their control." Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, at 2592, 2593 (1979).
>
> See also: Robbins v. California, ___ U.S. ___, 101 S.Ct. 2841 (1981); United States v. Chadwick, 433 U.S. 1, 97 S.Ct. 2476 (1977).

In sum, there are three distinct violations of the Fourth Amendment: (1) Helen Sonnier did not have authority to validly consent to the search of petitioner's vehicle, (2) the warrantless search of the vehicle was unjustified, and (3) the warrantless search of the briefcase found in the vehicle was unjustified.

The Supreme Court of Louisiana found this issue not even worthy of discussion, and as not involving any legal issues not governed by well-settled principles of law. Appendix, at p. 24a. The principles of law which govern this issue, in Matlock, Roaden and Chadwick, supra, may be well settled, but they do not support the opinion of the Louisiana court.

The Court should grant the writ to consider the violation of petitioner's rights under the Fourth Amendment.

II. A NEW SENTENCING HEARING IS REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS WHERE ONE OF SEVERAL AGGRAVATING CIRCUMSTANCES UPON WHICH A DEATH SENTENCE IS BASED IS FOUND ON APPEAL TO BE INSUFFICIENT.

The trial jury found the existence of the following statutory aggravating circumstances: (1) perpetration of aggravated kidnapping, aggravated burglary and armed robbery; (2) the creation of the risk of death to more than one person; and (3) the perpetration of the offense in an especially heinous, atrocious or cruel manner. Appendix, pp. 90a-91a. On the appeal, the Supreme Court of Louisiana construed this Court's decision in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759 (1980), as requiring evidence of torture or the pitiless infliction of pain [Appendix, at pp. 53a-55a], to support the finding that the crime

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was committed in an especially heinous or atrocious manner. The court found the evidence in this case to be insufficient to support this circumstance.

But the court held that

> ". . . it knows of no constitutional requirement that a death sentence be vacated whenever the jury errs in only one of its findings of several statutory aggravating circumstances." Appendix, at p. 56a.

This decision, and the failure to order a new sentencing hearing, presumes that the jury would have recommended death notwithstanding the insufficient circumstance. This is, in effect, giving indulgence to a conclusive presumption against the defendant in a capital case. The use of such a presumption is highly unusual, if not unprecedented, even if the presumption were rational.

Several decisions of this Court have clear application here. In Bachellar v. Maryland, 397 U.S. 564, 90 S.Ct. 1312 (1970); Street v. New York, 394 U.S. 576, 89 S.Ct. 1354 (1969); Yates v. United States, 354 U.S. 298, 77 S.Ct. 1064 (1957); and Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532 (1931), this Court held that a criminal conviction must be reversed if the jury could have based the verdict on an unconstitutional statutory ground, even though there were other valid statutory grounds which the jury may in fact have employed. In those cases, since the defendants' convictions may have rested on an unconstitutional ground, they were reversed.

There are, obviously, distinctions between the cited cases and the instant case. Here is involved a sentence rather than a conviction, and a statutory ground unconstitutionally applied rather than facially invalid. But these differences merely highlight the need for reversal more urgently. If an ordinary criminal conviction which may have rested on an unconstitutional ground must be set aside, then a death sentence must be reversed which has a possible unconstitutional ground, since a death sentence calls for a greater degree of reliability.

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Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964 (1978). A verdict based upon evidence insufficient for a finding beyond a reasonable doubt is equally unconstitutional as one based on a facially unconstitutional statute. Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781 (1979).

Following the decision in Godfrey v. Georgia, supra, this Court vacated and remanded five Georgia cases for reconsideration, despite the fact that each of those cases involved aggravating circumstances other than the one improperly applied in Godfrey. See Brooks v. State, 244 Ga. 574, 261 S.E.2d 379 (1979), vacated and remanded, 446 U.S. 961, 100 S.Ct. 2937 (1980); Hamilton v. State, 244 Ga. 145, 259 S.E.2d 81 (1979), vacated and remanded, 446 U.S. 961, 100 S.Ct. 2936 (1980); Baker v. State, 243 Ga. 710, 257 S.E.2d 192 (1979), vacated and remanded, 446 U.S. 961, 100 S.Ct. 2936 (1980); Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979), vacated and remanded, 446 U.S. 961, 100 S.Ct. 2936 (1980); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979), vacated and remanded, 446 U.S. 961, 100 S.Ct. 2934 (1980). See also Justice Stewart's dissent from the denial of certiorari in Martin v. Louisiana, ___U.S.___, 101 S.Ct. 540 (1980).

Consistent with these principles is the decision in Stephens v. Zant, 631 F.2d 397 (5th Cir., 1980), in which one of several circumstances was found unconstitutional, and the death sentence was vacated. But in another case, the Louisiana Supreme Court has indicated that it found the Stephens decision "not persuasive." State v. Monroe, 397 So.2d 1258, 1276 (La., 1981).

Notwithstanding the cited decisions, it cannot logically be argued that a jury which erroneously believes it has found three aggravating circumstances to exist will not be more apt to recommend death than would a jury which correctly believes only two circumstances to exist. Ordinary citizen jurors are likely to be led to the common sense conclusion that, if a defendant can be put to death for a murder involving just one aggravating

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circumstance, then the more aggravating circumstances found to exist the more likely it is that any mitigating circumstances are outweighed and that the death penalty is appropriate.

To presume that the jury would have recommended death notwithstanding the insufficient circumstance is to deprive the defendant of due process, in that it assumes as fact, without chance for rebuttal, a situation not supported by reason. A sentence of death imposed through the use of such a presumption violates the Eighth and Fourteenth Amendments.

Because of the recurring nature of this question, the Court should grant the writ to consider this Eighth Amendment violation.

III. THE DEATH PENALTY IMPOSED AFTER A FAILURE TO INSTRUCT THE JURY ON THE EFFECT OF AND WEIGHT TO BE GIVEN TO MITIGATING CIRCUMSTANCES VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

Article 905.3 of the Louisiana Code of Criminal Procedure [Appendix, p. 2a], provides that "[a] sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed."

The statutory law of Louisiana requires only the consideration of mitigating circumstances. There is no requirement as to the standard to be used to determine whether these circumstances exist; indeed, the law does not explicitly require that the jury determine whether any mitigating circumstances exist through some definable process. Beyond this, the sentence of death could be recommended even if all listed mitigating circumstances were established by the evidence. See, for example, State v. Martin, 376 So.2d 300 (La., 1979), cert. denied sub nom. Martin v. Louisiana, ___U.S.___, 101 S.Ct. 540 (1980), where there were an unusually large number of mitigating circumstances and where a majority of the statutory mitigating factors were

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present, yet the death sentence was upheld.

The question is not whether the death sentence must be excluded if a mitigating circumstance exists. Rather, the error is that the jury is given no guidance as to the finding and the effect of a mitigating circumstance. The statutes of Louisiana provide no such guidance, and in this case, there was no instructions on the subject. If a jury's discretion with regard to sentencing is to be narrowed and properly channeled so as to avoid the arbitrary, pre-Furman results, there is a tangible need for more precision in dealing with the existence of mitigating circumstances.

Defense counsel at trial noticed this problem, and attempted to deal with it by requesting a special jury instruction. Appendix, p. 86a. What trial counsel was attempting was to draw some focus upon the existence and effect of mitigating circumstances. The charge actually given to the jury had very little to say on the subject. The totality of the charge on mitigation was thus:

> "Even if you find the existence of an aggravating circumstance, you are not required to impose the death penalty. You must also consider any mitigating circumstances before you decide whether a sentence of death should be imposed. The law specifically lists certain mitigating circumstances.
>
> [Here the court read the list of the statutory mitigating circumstances from Louisiana Code of Criminal Procedure art. 905.5.]
>
> "You will note that you are authorized to consider 'any other relevant mitigating circumstance.'
>
> "* * * Whether any of the aggravating or mitigating circumstances exist is a fact for you to determine based upon the evidence presented." Record of No. 80KA1846, Trial Transcript, pp. 789-91.

In sum, the jury was told that it must consider mitigating circumstances, and were given examples of that those circumstances might be. In contradistinction, the jury was properly and extensively instructed on the aggravating circumstances, the standard of proof thereof, and the effect of a finding.

The jury must have some criteria by which to weigh

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effectively any mitigating circumstances. Even if no absolute result can be dictated should a mitigating circumstance be found to exist, the jury should be given some guidance beyond their merely being told to consider a list. The jury should be told something about the proper balancing of aggravating and mitigating circumstances, in relation to the particular crime and the character and propensities of the offender. Cf., Roberts v. Louisiana, 428 U.S. 325, 333, 96 S.Ct. 3001, 3006 (1976).

Of the three state sentencing procedures considered and approved by the Court in the 1975 Term (Georgia, Florida and Texas), only Florida had undertaken to list possible mitigating circumstances. Under the Florida procedure,

> "At the conclusion of the hearing the jury is directed to consider '[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist; and . . . [b]ased on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.' [Fla. Stat.Ann.] §§ 921.141(2)(b) and (c)(Supp.1976-1977). The jury's verdict is determined by a majority vote. It is only advisory; the actual sentence is determined by the trial judge. * * *
>
> "The trial judge is also directed to weigh the statutory aggravating and mitigating circumstances when he determines the sentence to be imposed on a defendant. The statute requires that if the trial court imposes a sentence of death, 'it shall set forth in writing its findings upon which the sentence of death is based as to the facts: (a) [t]hat sufficient [statutory] aggravating circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances' § 921.141(3)(Supp.1976-1977)."
>
> Proffitt v. Florida, 428 U.S. 242, 248-49, 96 S.Ct. 2960, 2965 (1976).

The procedure approved in Proffitt required that the aggravating circumstances outweigh the mitigating circumstances, and the circumstances are twice weighed: by the jury and by the judge. Because of this weighing factor, this Court concluded:

> "The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled . . . ." Proffitt v. Florida, supra, 428 U.S., at 258, 96 S.Ct., at 2969.

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Because the jury was told nothing about weighing or balancing the circumstances, and was given no indication of the effect of mitigating circumstances beyond being told that they must consider them, but on the other hand, were extensively instructed on aggravating circumstances, there was none of the balancing spoken of in Proffitt, and the sentence of death recommended by the jury is therefore defective and in violation of the Eighth Amendment.

CONCLUSION

The search of petitioner's automobile was in violation of the Fourth Amendment for three independent reasons: Helen Sonnier had no authority to consent to the search, there were no exigent circumstances to justify the warrantless search of the automobile, and there similarly were no exigencies to justify the warrantless search of the briefcase found in the car.

The failure of the Supreme Court of Louisiana to order a new sentencing hearing when one of the aggravating circumstances upon which the death sentence is based is found to be constitutionally insufficient violates the petitioner's rights under the Eighth Amendment.

The failure to instruct the trial jury on the effect of and weight to be given to mitigating circumstances also violates the Eighth Amendment.

For the above reasons, petitioner prays that a writ of certiorari issue herein to review the judgments of the Supreme Court of Louisiana in this case.

/S/ Garland R. Rolling

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NO.

THE SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELMO PATRICK SONNIER,

Petitioner,

-v.-

LOUISIANA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF LOUISIANA

CERTIFICATE OF SERVICE

I, Garland R. Rolling, hereby certify that I am a member of the Bar of the Supreme Court of the United States and that I have served copies of the Petition for Writ of Certiorari in the above case on counsel for the respondent by depositing the same in the United States Mail, first class postage prepaid, addressed as follows:

Hon. William J. Guste, Jr.
Attorney General of Louisiana
234 Loyola Avenue
New Orleans, Louisiana 70112

Mr. Dracos D. Burke
Assistant District Attorney
Post Office Box 7
New Iberia, Louisiana 70560

All parties required to be served have been served.

Done this 2nd day of November, 1981.

/S/ Garland R. Rolling

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STATE STATUTORY PROVISIONS INVOLVED

La.Rev.Stat.Ann. 14:30 (1979 Supp.) "First degree murder

> First degree murder is the killing of a human being when the offender has a specific intent to kill or to inflict great bodily harm.
>
> Whoever commits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation or suspension of sentence in accordance with the recommendation of the jury."

[NOTE: The above is how the first degree murder statute read at the time of the offense herein, and until its amendment by Act No. 74 of the Regular Session of the 1979 Louisiana Legislature.]

La.Code Crim.Pro.Ann., art. 905 (1981 Supp.) "Capital cases; sentencing hearing required

> Following a verdict of guilty in a capital case, a sentence of death may be imposed only after a sentencing hearing as provided herein."

La.Code Crim.Pro.Ann., art. 905.1 (1981 Supp.) "Sentencing hearing jury; commencement

> A. Except as provided in Part B herein, the sentencing hearing shall be conducted before the same jury that determined the issue of guilt. The order of sequestration shall remain in effect until the completion of the sentencing hearing.
>
> B. If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of The Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empaneled."

La.Code Crim.Pro.Ann., art. 905.2 (1981 Supp.) "Sentencing hearing; procedure and evidence

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. The hearing shall be conducted according to the rules of evidence. Evidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment."

La.Code Crim.Pro.Ann., art. 905.3 (1981 Supp.) "Sentence of death; jury findings

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one

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statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. The jury shall be furnished with a copy of the statutory aggravating and mitigating circumstances."

La.Code Crim.Pro.Ann., art. 905.4 (1981 Supp.) "Aggravating circumstances

The following shall be considered aggravating circumstances:

(a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;

(b) the victim was a fireman or peace officer engaged in his lawful duties;

(c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;

(d) the offender knowingly created a risk of death or great bodily harm to more than one person;

(e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

For the purposes of Subparagraph (b) herein, the term peace officer is defined to include any constable, marshal, deputy marshal, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, attorney general, assistanfe attorney general, attorney general's investigator, district attorney, assistant district attorney, or district attorney's investigator."

La.Code Crim.Pro.Ann., art. 905.5 (1981 Supp.) "Mitigating circumstances

The following shall be considered mitigating circumstances:

(a) The offender has no significant prior history of criminal activity;

(b) The offense was committed while the offender was under the influence of extreme mental or emotional disturbance;

(c) The offense was committed while the offender was under the influence or under the domination of another person;

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(d) The offense was committed under circumstances which the offender reasonably believed to provide a moral justification or extenuation for his conduct;

(e) At the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform hos conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;

(f) The youth of the offender at the time of the offense;

(g) The offender was a principal whose participation was relatively minor;

(h) Any other relevant mitigating circumstance."

La.Code Crim.Pro.Ann., art. 905.6 (1981 Supp.) "Jury; unanimous recommendation

A sentence of death shall be imposed only upon the unanimous recommendation of the jury. If the jury unanimously finds the sentence of death inappropriate, it shall recommend a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."

La.Code Crim.Pro.Ann., art. 905.8 (1981 Supp.) "Imposition of sentence

The court shall sentence the defendant in accordance with the recommendation of the jury. If the jury is unable to unanimously agree on a recommendation, the court shall impose a sentence of life imprisonment without benefit of probation, parole or suspension of sentence."

La.Code Crim.Pro.Ann., art. 905.9 (1981 Supp.) "Review on appeal

The Supreme Court of Louisiana shall review every sentence of death to determine if it is excessive. The court by rules shall establish such procedures as are necessary to satisfy constitutional criteria for review."

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STATE of Louisiana

v.

Elmo Patrick SONNIER.

No. 63293.

Supreme Court of Louisiana.

June 25, 1979.

Opinion Concurring in Part, Dissenting in Part July 6, 1979.

On Rehearing Jan. 28, 1980.

Rehearing Denied March 3, 1980.

Defendant was convicted before the Sixteenth Judicial District Court, Parish of Iberia, C. Thomas Bienvenu, Jr., P. J., of two counts of first-degree murder and was sentenced to death, and he appealed. The Supreme Court, Blanche, J., held that: (1) pretrial publicity was not so prejudicial as to preclude defendant from receiving fair trial and thereby warrant grant of change of venue; (2) refusal to order additional investigation into defendant's sanity was not abuse of discretion; (3) failure to rearraign defendant under a "separate" or "severed" indictment was not prejudicial; (4) denial of challenge for cause directed at prospective juror, whose niece was married to brother of a victim, whose parents were old friends of the other victim's family and whose brother was serving as a sheriff, was not abuse of discretion; (5) defendant lacked standing to raise contention that absence of any statutory provision requiring state to give him notice of aggravating circumstances relied on in seeking death penalty denied defendant due process; and (6) sentence was not excessive. On rehearing, the Supreme Court, Calogero, J., further held that fact that statute authorizing establishment of rules governing work release programs was read to jury, without informing jury that persons convicted of murder would be ineligible for participation in work release programs, was error requiring that sentence be vacated.

Conviction affirmed; sentence vacated; remanded for new trial on penalty issue only.

Dennis, J., concurred in part and dissented in part from the original opinion and filed opinion.

Summers, C. J., dissented.

Marcus, J., concurred in part and dissented in part and assigned reasons.

Blanche, J., dissented and assigned reasons.

1. Criminal Law ⇐126(1)

Statute pertaining to granting change of venue in criminal cases requires a showing of more than mere knowledge by the public of facts surrounding the offense; it requires, in addition, proof of such prejudice in the public mind that a fair and impartial trial cannot be obtained in the parish. LSA-C.Cr.P. art. 622.

2. Criminal Law ⇐121, 1150

Whether to grant motion for change of venue in criminal proceeding rests within sound discretion of trial judge, and his ruling denying motion will not be disturbed unless evidence affirmatively shows that the ruling was erroneous and an abuse of judicial discretion. LSA-C.Cr.P. art. 622.

3. Criminal Law ⇐134(4)

Defendant's contention, in support of claim that trial court erred in refusing to grant change of venue in proceeding in which he was convicted of two counts of first-degree murder and was sentenced to death, that defendant's transfer to prison in another parish after he was arrested and booked was necessitated due to fear for his safety based on public outcry in the community was without support in the record. LSA-R.S. 14:30; LSA-C.Cr.P. art. 622.

4. Criminal Law ⇐126(2)

Extensive pretrial publicity, which, in regard to a double murder, consisted pri-

marily of factual information objectively reported as transpiring at the time, in which the prearrest articles contained only the barest of facts regarding the crime and its victims and in which postarrest articles generally were confined to factually reporting the occurrence and results of various pretrial proceedings, was not so prejudicial as to preclude defendant from receiving a fair trial and thereby warrant the grant of a change of venue. LSA-R.S. 14:30; LSA-C.Cr.P. art. 622.

5. Criminal Law ⇐655(4)

In "dry run" voir dire held in murder prosecution to determine effect of publicity on prospective jurors, trial court did not err in interrupting counsel's examination to determine whether the witnesses understood presumption of innocence, reasonable doubt and that a person would be asked, if sworn as a juror, to put aside any previous opinion he may have formulated and to render a verdict strictly on the evidence presented at trial. LSA-R.S. 14:30.

6. Criminal Law ⇐134(4)

"Dry run" voir dire, which was held to determine effect of publicity on prospective jurors in prosecution for two counts of first-degree murder and in which all prospective jurors called to testify indicated that they could put aside whatever they had heard outside courtroom, afford defendant presumption of innocence and decide question solely on evidence presented in court though two prospective jurors testified that it would be difficult, did not establish that such prejudice existed in minds of public that fair trial could not be obtained, and thus, that granting a change of venue was warranted. LSA-R.S. 14:30; LSA-C.Cr.P. art. 622.

7. Criminal Law ⇐740

When defendant pleads not guilty and not guilty by reason of insanity, court is prohibited from determining defendant's sanity at time of the offense; such question is reserved for jury. LSA-C.Cr.P. art. 650.

8. Criminal Law ⇐331

Burden was on accused to prove his insanity. LSA-C.Cr.P. art. 650.

9. Mental Health ⇐434

In proceeding in which defendant was convicted of two counts of first-degree murder, in which sanity commission was appointed and in which its members concluded, after conducting separate psychiatric interviews with defendant and being furnished with psychological evaluation prepared by psychologist employed by defense counsel, that defendant was sane at time of the offense and that further testing would not produce a contrary result, refusal to order additional investigation in regard to defendant's sanity at time of offense was not abuse of discretion. LSA-R.S. 14:30; LSA-C.Cr.P. art. 650.

10. Criminal Law ⇐1166(3)

Failure to rearraign defendant under a "separate" or "severed" indictment, which was filed after State announced its intention to try jointly indicted defendants separately, was not prejudicial to defendant where severed indictment charged the same offense as that charged under joint indictment and defendant had been arraigned under such indictment. LSA-C.Cr.P. arts. 704, 705.

11. Criminal Law ⇐1166.18

To establish reversible error in failing to grant challenges for cause directed at prospective jurors, it must be showed that trial judge erred in refusing to sustain a challenge for cause and that defendant has exhausted all his peremptory challenges. LSA-C.Cr.P. arts. 797, 800.

12. Criminal Law ⇐1152(2)
Jury ⇐85

Trial judge is vested with broad discretion in ruling on a challenge for cause directed at prospective juror, and such ruling will not be disturbed on appeal absent showing of abuse. LSA-C.Cr.P. arts. 797, 800.

13. Jury ⇐90

In proceeding in which defendant was convicted of first-degree murder, refusal to grant challenge for cause directed to prospective juror, whose niece was married to brother of a victim, whose parents were old friends of the other victim's family, whose brother was such victim's employer, whose brother was serving as sheriff of a parish when abductions in question occurred in such parish and who stated that she would decide case entirely on evidence presented in court, was not abuse of discretion. LSA-R.S. 14:30; LSA-C.Cr.P. arts. 797, 797(3), 800.

14. Jury ⇐97(2)

Fact that prospective juror knows victim of an offense is not in itself sufficient grounds for a challenge for cause, but, rather, the defense must show that juror's acquaintance with victim is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict. LSA-C.Cr.P. art. 797.

15. Jury ⇐97(2)

Prospective juror's relationship to law enforcement officers does not necessarily require that a challenge for cause be granted. LSA-C.Cr.P. art. 797.

16. Jury ⇐103(3, 5)

In proceeding in which defendant was convicted of two counts of first-degree murder, denial of challenge for cause directed at prospective juror, who initially testified that he believed defendant to be guilty and that juror would require defendant to present some evidence, but who, after instruction, acknowledged that juror understood principles of burden of proof, presumption of innocence and reasonable doubt and that he believed that he could set aside his prior opinion, consider only evidence presented in court and render fair and impartial verdict, was not error. LSA-R.S. 14:30; LSA-C.Cr.P. arts. 797, 797(3), 800.

17. Jury ⇐99(1)

Mere fact that prospective juror has knowledge of facts surrounding occurrence of the offense does not necessarily make him subject to a challenge for cause. LSA-C.Cr.P. art. 797.

18. Jury ⇐99(8)

In proceeding in which defendant was convicted of first-degree murder, denial of challenge for cause directed at prospective juror, who, as a radio announcer, read news broadcasts relating to the crime and pretrial proceedings but took no part in investigative reporting, who testified that he had no preformulated opinion regarding defendant's guilt or innocence and who remarked that he would have reservations about someone in his position serving on the jury if he were the defendant, was not error. LSA-R.S. 14:30; LSA-C.Cr.P. arts. 797, 797(3), 800.

19. Criminal Law ⇐438(7)

Admissibility of gruesome or inflammatory photograph is determined by weighing probative value of photograph against any possible prejudicial effect it may have on jury.

20. Criminal Law ⇐438(6)

In proceeding in which defendant was convicted of two counts of first-degree murder admission of photographs, which were taken of victims' bodies and which showed no wounds or blood on victims, for purpose of proving identity of victims and position of the bodies and for purpose of explaining why some brass casings that were fired were not found was not abuse of discretion; even if photographs indicated that victims were holding hands, any inflammatory qualities such a feature might produce were outweighed by probative value of the photograph. LSA-R.S. 14:30.

21. Criminal Law ⇐517(5)

If statement refers to other crimes, defendant has option of having only that portion of the statement pertaining to the charged offense submitted as evidence or having the whole statement introduced; defendant cannot have entire confession sup-

pressed if it is otherwise admissible. LSA–R.S. 15:450.

22. Criminal Law ⇐412.1(1), 517.1(1)

State must establish beyond reasonable doubt that confession or inculpatory statement was made freely and voluntarily before it can be introduced at trial. LSA–C.Cr.P. art. 703, subd. C; LSA–R.S. 15:451.

23. Criminal Law ⇐412.2(1)

If statement is obtained during custodial interrogation, state must show that accused was advised of his constitutional rights before the statement can be introduced at trial. LSA–C.Cr.P. art. 703, subd. C; LSA–R.S. 15:451.

24. Criminal Law ⇐736(2), 1158(4)

Admissibility of inculpatory statement is for trial judge to determine and his conclusions as to credibility and weight of the testimony relating to voluntariness of the statement will not be overturned unless they are unsupported by the evidence. LSA–C.Cr.P. art. 703, subd. C; LSA–R.S. 15:451.

25. Criminal Law ⇐519(1)

Fact that defendant assertedly was intimidated by his arrest by seven armed officers did not render his confessions to murders involuntary, in light of the fact that the confessions were made sometime after the arrest in presence of only two detectives whose weapons were concealed by their clothing. LSA–R.S. 14:30, 15:451; LSA–C.Cr.P. art. 703, subd. C.

26. Criminal Law ⇐1178

Where assignment of error was neither briefed nor argued, it would be considered abandoned.

27. Constitutional Law ⇐270(1)
Criminal Law ⇐1208(1)

Defendant is entitled in a capital sentencing proceeding, no less than in the guilt or innocence trial, to be informed of nature and cause of the accusation against him and to his Fifth Amendment right to notice given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and setting forth the alleged misconduct with particularity. LSA–Const. art. 1, § 13; U.S.C.A.Const. Amend. 5.

28. Criminal Law ⇐1208(1)

Defendant is entitled, in a capital sentencing proceeding, to know the aggravating circumstances which the prosecution will seek to prove sufficiently in advance of court proceedings so that reasonable opportunity to prepare will be afforded. LSA–Const. art. 1, § 13; U.S.C.A.Const. Amend. 5.

29. Constitutional Law ⇐42.1(3)

Defendant, who was convicted of two counts of first-degree murder and was sentenced to death, lacked standing to raise contention that absence of any statutory provision requiring State to give defendant notice of aggravating circumstances relied on in seeking death penalty denied defendant due process and denied him sufficient opportunity to prepare a defense where defendant did not allege that he was not informed of which aggravating circumstances the State would rely on and it was not shown that he had made any attempt to obtain such information. LSA–R.S. 14:30; LSA–Const. art. 1, § 13; U.S.C.A.Const. Amend. 5.

30. Criminal Law ⇐1208(1)

Statute pertaining to imposition of death sentences places on state the burden to prove beyond a reasonable doubt that at least one or more statutory aggravating circumstances exist; fact that district attorney in some cases may, at the sentencing portion, ask jury to consider evidence already introduced at guilt portion in making its determination of the existence of any statutory aggravating circumstance does not reduce the burden of proof placed on state. LSA–C.Cr.P. art. 905.3.

31. Criminal Law ⇐1206(1)

Statute, which pertains to sentencing hearings in capital cases, was not unconsti-

tutional on theory that such statute, by permitting jury to consider "any evidence offered at the trial on the issue of guilt," injected an element of arbitrariness into the proceedings. LSA–C.Cr.P. art. 905.2.

32. Homicide ⇐354

Evidence established that jury's recommendation that defendant, who was convicted of two counts of first-degree murder, be sentenced to death, was not influenced by passion, prejudice or any other arbitrary factors. LSA–R.S. 14:30; LSA–C.Cr.P. arts. 905.1–905.9; Supreme Court Rules, rule 28, § 1, 8 LSA–R.S.

33. Criminal Law ⇐1208(1)

Statute pertaining to imposition of death sentences empowers jury to consider death penalty if it correctly finds that one statutory aggravating circumstance exists; as long as jury is required to find at least one statutory aggravating circumstance, jury's discretion is controlled by clear and objective standards so as to produce nondiscriminatory application. LSA–C.Cr.P. art. 905.3.

34. Robbery ⇐11

"Armed robbery" is the theft of anything of value from the person of another or which is in the immediate control of another by force or intimidation while armed with a dangerous weapon.

See publication Words and Phrases for other judicial constructions and definitions.

35. Homicide ⇐354

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death, evidence sufficiently warranted a conclusion that armed robbery was an aggravating circumstance. LSA–R.S. 14:30, 14:110; LSA–C.Cr.P. art. 905.3.

36. Homicide ⇐354

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death, evidence sufficiently warranted a conclusion that aggravated burglary was an aggravating circumstance. LSA–R.S. 14:30, 14:60; LSA–C.Cr.P. arts. 905.1–905.9, 905.3; Supreme Court Rules, rule 28, § 1, 8 LSA–R.S.

37. Kidnapping ⇐1

Sexual gratification is something of "value or advantage" under statute providing that "Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim * * * to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control * * *." LSA–R.S. 14:44.

See publication Words and Phrases for other judicial constructions and definitions.

38. Kidnapping ⇐1

"Aggravated kidnapping" occurs when offender forcibly seizes and carries a person from one place to another with intent to force victim, or some other person, to perform a sexual act, or acts, for the advantage of offender as a condition of release of the person seized. LSA–R.S. 14:44.

See publication Words and Phrases for other judicial constructions and definitions.

39. Homicide ⇐354

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death, evidence sufficiently supported finding that aggravated kidnapping was an aggravating circumstance. LSA–R.S. 14:30, 14:44; LSA–C.Cr.P. arts. 905.1–905.9, 905.3; Supreme Court Rules, rule 28, § 1, 8 LSA–R.S.

40. Criminal Law ⇐1208(1)

Capital punishment law was intended to be interpreted by Supreme Court with reference to constitutionally approved interpretations contained in United States Supreme Court cases. LSA–C.Cr.P. arts. 905.1–905.9.

8a

release programs, was error requiring that sentence be vacated. LSA–R.S. 14:30, 15:1111, 15:1111, subds. A, B.

Allen A. McElroy, Jr., McElroy & Ramsey, Ltd., Berwick, Steven P. Shea, New Iberia, for defendant-appellant.

William J. Guste, Jr., Atty. Gen., Barbara Rutledge, Asst. Atty. Gen., Knowles M. Tucker, Dist. Atty., Dracos D. Burke, Asst. Dist. Atty., for plaintiff-appellee.

BLANCHE, Justice.

Defendant, Elmo Patrick Sonnier, was indicted by grand jury for two counts of first degree murder in violation of LSA–R.S. 14:30. Trial was held on April 12–14, 1978. Defendant was found guilty on each count by a twelve-person jury. Following the sentencing portion of the trial, the jury recommended that the defendant be sentenced to death on each count. The defense requested that the jury be polled, both as to the verdict and the sentence. The trial court was satisfied that the jury had unanimously reached its conclusions. On April 25, 1978, defendant was sentenced to death on each count of first degree murder.

Defendant assigns thirteen errors as the basis for his appeal before this Court. Assignment No. 13 contains four assignments relating to the sentencing proceedings. Finding no reversible error in either the guilt or sentence portion of the trial, we affirm both the conviction and the sentence.

FACTS

On the evening of November 4, 1977, David LeBlanc, age sixteen, and Loretta Ann Bourque, age eighteen, attended a high school football game. Later that evening, the couple parked in a remote area of St. Martin Parish. At approximately one o'clock A.M., defendant and his brother, Eddie James Sonnier, who were rabbit hunting together, came across the couple's car. Using a badge one of the brothers had obtained while working as a security guard and armed with 22-caliber rifles, the two posed as police officers and approached and entered the car. The victims were informed that they were trespassing and that they would have to be brought to the landowner to determine if the landowner desired to press charges. At this time the driver's licenses of both victims were confiscated. The two victims were then handcuffed and placed in the back seat of their (the victims') car. Leaving their own car behind, the defendant and his brother drove the couple twenty-one miles to a remote oilfield located in Iberia Parish, an area known to the defendant.

Once at the oilfield, both victims were removed from the car. David LeBlanc was taken into the woods and handcuffed to a tree. Loretta Bourque was taken a short distance away and raped by the defendant, Elmo Sonnier. She then agreed to have intercourse with Eddie Sonnier in exchange for the couple's safe release. Upon completion of the rapes, the two youngsters were unhandcuffed and brought back toward the road where the car was parked.

At that point, Elmo Sonnier told his brother they could not let the couple go because if the youngsters talked, it would mean he (Elmo) would have to go back to Angola. David LeBlanc and Loretta Bourque were then forced to lie side by side, face down, and were each shot three times at close range in the back of the head. Eddie Sonnier testified that he held a flashlight while the defendant shot the youngsters with a 22-caliber rifle. He further related that Bourque began to cry when the defendant fired a first shot at her which missed. The defendant then fired a second shot which succeeded in striking Bourque in the back of the head. The third shot likewise struck LeBlanc in the back of the head. Each victim was then shot two additional times. At the trial, expert testimony indicated that any one of the shots would have resulted in instantaneous death to the victims.

41. Criminal Law ⇐1208(1)

For a crime to be heinous, atrocious or cruel, so as to constitute an aggravating circumstance permitting imposition of death penalty, the crime must involve torture or pitiless infliction of pain on the victim, but the torture or pitiless infliction of pain can be either physical or psychological. LSA-C.Cr.P. arts. 905.1-905.9.

42. Homicide ⇐354

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death, evidence, including evidence that boyfriend victim was handcuffed to tree while girlfriend victim was being raped, that she was forced to have intercourse to secure promise of safe release, that victims were forced to lie side by side for purpose of being shot and were notified of their impending doom by shot which missed, was sufficient to support finding that there was the aggravating circumstance of commission of the crimes in an especially heinous, atrocious or cruel manner. LSA-R.S. 14:30; LSA-C.Cr.P. arts. 905.1-905.9; Supreme Court Rules, rule 28, § 1, 8 LSA-R.S.

43. Homicide ⇐354

Where offender kills two or more persons during single consecutive course of conduct for purpose of preventing any one of those killed from disclosing murder of the other, or others, offender's conduct involves risk of death or great bodily harm to more than one person so as to constitute an aggravating circumstance permitting imposition of death penalty. LSA-C.Cr.P. arts. 905.1-905.9, 905.3.

44. Homicide ⇐354

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death, evidence sufficiently supported finding that a risk of death or great bodily harm to more than one person was an aggravating circumstance. LSA-R.S. 14:30; LSA-C.Cr.P. arts. 905.1-905.9, 905.3.

45. Criminal Law ⇐1206(2)

Death sentence for first-degree murder offenses, which involved several aggravating circumstances and which were committed by 26-year-old defendant with a prior criminal record, was not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. LSA-R.S. 14:30; LSA-C.Cr.P. arts. 905.1-905.9; Supreme Court Rules, rule 28, § 4(b), 8 LSA-R.S.

46. Homicide ⇐354

Death sentence for two counts of first-degree murder was not excessive, in view of indication that it was not imposed under influence of passion, prejudice or any other arbitrary factors, that there were one or more statutory aggravating circumstances and that the sentence was not disproportionate to the penalty imposed in similar cases. LSA-R.S. 14:30; LSA-C.Cr.P. arts. 905.1-905.9; Supreme Court Rules, rule 28, § 4(b), 8 LSA-R.S.

On Rehearing

47. Criminal Law ⇐1134(8)

In fulfilling its responsibility of reviewing jury's recommendation of death penalty, Supreme Court must conduct an independent review, regardless of the failure of defense counsel to object to possible error, to determine whether passion, prejudice or any arbitrary factor has contributed to the recommendation of death penalty. LSA-C.Cr.P. arts. 841, 844, 905.9; Supreme Court Rules, rule 28, § 1, 8 LSA-R.S.

48. Criminal Law ⇐863(2), 1174(1)

In proceeding in which defendant was convicted of two counts of first-degree murder and was sentenced to death and in which jury requested information whether defendant would be eligible for work release, fact that statute authorizing establishment of rules governing work release program was read to jury, without informing jury that persons convicted of murder would be ineligible for participation in work

The defendant and his brother then drove the victims' vehicle back to the original site where the couple was first accosted in order to pick up their own car. Finding their car with a flat tire, they used a jack from the LeBlanc vehicle to make the change. The jack was later seized by police from the trunk of the defendant's car. The brothers then destroyed the victims' driver's licenses and the following day buried the rifles in another remote area. Investigation also revealed that thirty or forty dollars which was in the possession of the victims prior to the abduction could not be accounted for.

The defendant was arrested on December 5, 1977. He was advised of his rights and taken to the Sheriff's Office in New Iberia. While there, he made a free and voluntary confession which was transcribed by one of the police officers who was present. The statement was then read and signed by the defendant. The defendant was then routinely transferred to a parish prison in an adjacent parish. While enroute, he made another statement to the officers who were transporting him. The following day he made a third confession which was taped. All three statements indicated that the defendant had participated in the abduction of the victims and had shot them.

The police later recovered the two rifles which belonged to the defendant and his brother. Ballistics tests indicated that one of the bullets taken from one of the victim's head and four brass casings found by the police at the scene of the crime had positively been fired from the rifle which belonged to the defendant. Because of excessive damage, the other five bullets that were recovered could only be identified as having been fired from the same model, brand and caliber rifle as that belonging to the defendant.

The handcuffs used in the abduction were later recovered from Elmo Sonnier's bedroom. The State also produced a witness who testified that he had seen the defendants' blue 1961 Dart at the place where the abduction occurred during the early morning hours of November 5, 1977.

The defendant and his brother were jointly indicted on two counts of first degree murder by the grand jury of Iberia Parish. On January 19, 1978, the defendant was arraigned and pled not guilty and not guilty by reason of insanity. A sanity commission was appointed and on March 31, 1978, a sanity hearing was held at which defendant was determined to have the mental ability to assist counsel and understand the nature of the proceedings against him. The State announced on this same date its intention to try the defendant separately and further that it would file a severed indictment pursuant thereto.

On April 3, 1978, a hearing was held on a motion for change of venue. The motion was denied the following day. On April 6, 1978, a hearing was held in which the following motions were denied: (1) to sever, (2) to suppress evidence seized from a search of defendant's home, (3) to set aside the trial date, and (4) for additional mental examination of defendant. On the morning of trial the defendant changed his plea to not guilty.

We deem that the best method to analyze the defendant's appeal is to divide our analysis in the same manner in which the trial was divided: guilt portion and sentencing portion.

GUILT

Assignment Nos. 1 & 3

Defendant claims the trial judge erred in refusing to grant a change of venue. He also argues that during the hearing on the motion for change of venue the trial judge erred in asking various questions of potential jurors during a "dry run" venire.

LSA–C.Cr.P. art. 622 provides:

"A change of venue shall be granted when the applicant proves that by reason of prejudice existing in the public mind or because of undue influence, or that for any other reason, a fair and impartial trial cannot be obtained in the parish where the prosecution is pending.

"In deciding whether to grant a change of venue the court shall consider whether the prejudice, the influence, or the other reasons are such that they will affect the answers of jurors on the voir dire examination or the testimony of witnesses at the trial."

[1, 2] This Court has consistently held that to warrant a change of venue the burden is on the accused to establish that he cannot obtain a fair trial in the parish where the prosecution is pending. Article 622 requires a showing of more than mere knowledge by the public of facts surrounding the offense. It requires, in addition, proof of such prejudice in the public mind that a fair and impartial trial cannot be obtained in the parish. *State v. Sheppard*, 350 So.2d 615 (La.1977); *State v. de la Beckwith*, 344 So.2d 360 (La.1977); *State v. Berry*, 329 So.2d 728 (La.1976); *State v. Stewart*, 325 So.2d 819 (La.1976). The granting or denial of the motion for change of venue rests within the sound discretion of the trial judge, and his ruling denying the motion will not be disturbed unless the evidence affirmatively shows that the ruling was erroneous and an abuse of judicial discretion. *State v. Sheppard, supra; State v. de la Beckwith, supra; State v. Bennett*, 341 So.2d 847 (La.1976); *State v. Stewart, supra.*

In *State v. Bell*, 315 So.2d 307 (La.1975), we noted:

". . . The defendants were entitled to a change of venue if they could show, even though it would be possible to select a jury whose members were not subject to a challenge for cause, that there were influences in the community which would affect the answers of jurors on the voir dire, or the testimony of witnesses at the trial, or that, for any other reason, a fair and impartial trial could not be obtained in the parish. . . ." (*State v. Bell* at 313) [1]

Considering the evidence presented in support of the motion for a change of venue, we are confident that there was no abuse of discretion in denying the motion.

The defense claims that prejudice existed in the community and undue influence would be exerted on potential jurors such that a fair trial could not be obtained in Iberia Parish. In support of this, the defendant points to three separate factors as requiring a change of venue.

First, the defense claims that after the defendant was arrested and booked into the Iberia Parish Prison he was transferred to another prison in another parish because authorities feared for the safety of the defendant if he remained in New Iberia. The defense argues that this fear was based upon a public outcry in the community against the defendant. Second, counsel for the defense claims that pre-trial publicity was so extensive and so inflammatory that it was impossible for the defendant to receive a fair trial in Iberia Parish. Finally, the defendant claims that the "dry run" voir dire clearly established that prospective jurors were either prejudiced or influenced by the pre-trial publicity and had already formulated conclusions of guilt.

[3] There is no factual support in the record for defendant's first argument. Sheriff Gerard H. Wattigny testified, as did the other members of his office, that the transfer was standard procedure in his office for handling persons accused of capital

1. In *Bell*, this Court also set forth the following factors which are relevant in determining whether a change of venue should be granted:
". . . (1) [T]he nature of pretrial publicity and the particular degree to which it has circulated in the community, (2) the connection of government officials with the release of the publicity, (3) the length of time between the dissemination of the publicity and the trial, (4) the severity and notoriety of the offense, (5) the area from which the jury is to be drawn, (6) other events occurring in the community which either affect or reflect the attitude of the community or individual jurors toward the defendant, and (7) any factors likely to affect the candor and veracity of the prospective jurors on voir dire. . . ." (315 So.2d at 311)

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offenses or other serious felonies. He stated that the reason for this procedure was because of the design of the Iberia Parish Prison. On visiting day, all of the prisoners are allowed to circulate freely in a particular segment of the prison with visitors and other prisoners. He explained that this situation creates a security problem in that the risk of escape is increased. For this reason, to prevent escape, capital prisoners or persons accused of other serious felonies have routinely been transferred to other adjoining parishes during the twenty-two years while Wattigny has been Sheriff of Iberia Parish. In addition, none of the witnesses called by the defense could testify that there had been any hue and outcry, or any suggestion of vigilante activity, in the community following the arrest of the defendant. All of the witnesses questioned testified that they were unaware of any public demonstrations against the defendant, and both members of the Sheriff's office and employees of the various media organs stated that they had not received any threatening telephone calls relating to the defendant. We conclude that the record does not support defense counsel's contention that the sentiment in the community was so strong that it necessitated a transfer of the defendant to another parish for the defendant's safety.

[4] Defendant's second claim is that pre-trial publicity had so prejudiced the community against the defendant that it would be impossible for the defendant to receive a fair trial. There is no dispute that the pre-trial coverage by the media was extensive and that there was significant public interest in the development of the case. The publicity, however, was not so overwhelming, nor so prejudicial, as the defense would have this Court believe. The defense introduced approximately twenty-four newspaper articles from the *Daily Iberian*, the daily newspaper of Iberia Parish. These articles were published from November 6, 1977, through April 2, 1978. The majority of the articles ran either on the front page or the city page, which is the front page of the second section. The circulation of the *Daily Iberian* in Iberia Parish is only approximately 7,000 papers.[2] While the editor testified that this had been the top story of the year, he also testified that there were others that had also created high interest. He further stated that the Sheriff's Office and the District Attorney's Office had been very reluctant to discuss the case. The sum of the testimony of the rest of the staff of the *Iberian* called by the defense reveals that the *Iberian* undertook no independent investigation but simply reported information which was released through either the Sheriff's or District Attorney's Office. Several of the newspaper employees testified that the case received no greater publicity than comparable crimes in the parish which had occurred in the past. The defense and the State also stipulated that several radio and television stations also broadcasted statements issued by the Sheriff's and District Attorney's Offices as the statements were released.

After carefully examining all of the evidence filed in the record, we conclude that while the publicity was extensive, it consisted primarily of factual information objectively reported regarding the events that were transpiring at the time. Only the barest of facts regarding the crime and its victims are contained in the pre-arrest articles. Also, the post-arrest articles generally were confined to factually reporting the occurrence and results of various pre-trial proceedings. It is abundantly clear from reading the record that the public officials involved cautiously guarded against any

2. Defendant also introduced six articles from the *Teche News*, a weekly publication with a circulation of only ninety in Iberia Parish. Since the victims were from St. Martin Parish and since the paper was a weekly, the articles tended to be longer than those in the *Iberian*. That paper also carried a picture of the defendants on the front page which was not printed in the *Iberian* at all. Since the circulation of the *Teche News* is so small in Iberia Parish, the court did not really consider it as a factor.

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claim that the defendant was being tried through the media and released only the barest facts necessary to keep the interested public informed of the progress in the case. Likewise, the local media seemed satisfied to simply report these facts. There is a clear lack of any inflammatory journalism designed to whip up public prejudice or indignation against the defendant in this case.

In regard to the effect the publicity had on the citizens of Iberia Parish, the editor and other staff members of the *Iberian* testified that based upon their dealings with the public, they knew of no feelings or impressions in the minds of the citizens that would preclude the defendant from getting a fair trial.

The trial court held a "dry run" voir dire consistent with *State v. Bell, supra*, to determine the effect of the publicity on the prospective jurors. Defendant claims the testimony of the seven potential jurors that were examined established that such prejudice existed in the minds of the public so that no fair trial could be obtained in Iberia Parish. In connection with this, he claims the trial judge erred in interrupting defense counsel's direct examination of various witnesses and asking questions regarding whether the witness understood the presumption of innocence and other connected matters.

[5] First, we find no error in the actions of the trial judge in interrupting counsel's examination to determine whether the witness understood the presumption of innocence, reasonable doubt and that a person would be asked, if sworn as a juror, to put aside any previous opinion he may have formulated and render a verdict strictly on the evidence presented at the trial.

[6] A review of the testimony of the seven jurors causes us to conclude that the defendant failed to show such prejudice or undue influence in the community that the answers of prospective jurors on voir dire examination or testimony of witnesses at trial could be affected. Of the seven prospective jurors called, not one testified that he or she felt any pressure from any person or group outside the courtroom. A reading of the testimony indicates that the witnesses were quite candid and open in their answers. Also, of the seven witnesses called, they all testified that they could put aside whatever they had heard outside the courtroom, afford the defendant the presumption of innocence, and decide the question solely upon the evidence presented in court, although two of the prospective witnesses testified it would be difficult.[3]

We, therefore, conclude that the trial judge did not abuse his discretion in denying the defense motion for change of venue.

Assignment No. 2

By this assignment, the defense contends that the trial court was in error in refusing to require further psychiatric testing of the defendant regarding the defendant's mental capacity at the time the offense was committed. Prior to trial, defendant moved for appointment of a sanity commission to examine his (1) capacity to stand trial and (2) mental responsibility at the time of the alleged crimes. A sanity commission was appointed and a pre-trial hearing was held on March 31, 1978. At the conclusion of this hearing, the court ruled that the defendant had the requisite mental capacity to stand trial and it denied defense counsel's motion requesting the court to order further psychiatric evaluation into the defendant's mental capacity at the time of the offenses. The motion was re-urged and again denied on the morning of trial. The defendant subsequently changed his plea from not guilty and not guilty by reason of insanity to not guilty. The defense claims

3. Several of the witnesses initially testified that they had formulated an opinion. However, after being questioned by the court or by the District Attorney on cross-examination regarding the presumption of innocence, reasonable doubt and the duty to decide the case solely on the evidence presented in court, they stated they would be able to put aside their previous feelings and follow the instructions of the court.

that it was forced to change the plea because it lacked sufficient evidence to support the defense of insanity. Counsel for defense asserts it could not obtain such evidence because the defendant was unable to afford further psychiatric examination and the court refused to order the State to provide the same.

LSA–C.Cr.P. art. 650 provides:

"When a defendant enters a combined plea of 'not guilty and not guilty by reason of insanity,' the court may appoint a sanity commission as provided in Article 644 to make an examination as to the defendant's mental condition at the time of the offense. The court may also order the commission to make an examination as to the defendant's present mental capacity to proceed. Mental examinations and reports under this article shall be conducted and filed in conformity with Articles 644 through 646."

[7, 8] This Court has repeatedly held that this statute is permissive rather than mandatory and invests the trial judge with great discretion in the appointment of a sanity commission. *State v. Taylor*, 347 So.2d 172 (La.1977); *State v. Link*, 301 So.2d 339 (La.1974), and cases cited therein. When the defendant pleads "'not guilty and not guilty by reason of insanity'" the court is prohibited from determining the defendant's sanity at the time of the offense; this question is reserved for the jury. The burden is on the defendant to prove his insanity. *State v. Link, supra* at 341.

[9] In the case before us the trial court appointed a sanity commission to report on both the defendant's mental capacity to stand trial and his mental capacity at the time of the offense. Dr. Joseph Musso, the Coroner of the Parish of Iberia, and Dr. Sidney J. Dupuy, the Psychiatric Director at the Acadiana Mental Health Center in Lafayette, Louisiana, were named to carry out this task. At the sanity hearing, the trial judge allowed counsel for the defense to cross-examine the two physicians regarding the defendant's sanity at the time of the offense.

Dr. Musso and Dr. Dupuy conducted separate psychiatric interviews with the defendant, each lasting approximately one hour. To aid them in formulating their conclusions, the defense provided the commission members with a psychological evaluation prepared by two psychologists employed by defense counsel. The evaluation included the results of three tests administered to the defendant: the Wechsler Adult Intelligence Scale, the Bender-Gestalt Test and the Rorschach Examination. Dr. Dupuy's conclusions were also aided by statements made by the defendant on December 1 and 2, 1977, regarding the commission of the crime.

Both members of the commission testified that they felt the defendant was sane at the time of the offense and could differentiate right from wrong. In response to defense counsel's inquiry, both testified that they believed further testing or investigation would not produce a contrary result.

The State's only witness at the hearing was the defendant's former employer. He testified that the defendant had been a reliable and trustworthy employee and that he had never experienced any problems with the defendant's intelligence or judgment. He also testified that if the defendant were acquitted, he would be willing to re-hire the defendant if a position were available.

The thrust of defense counsel's argument is that the sanity commission did not do a thorough job and that the trial court should have ordered additional investigation, including interviewing the family and friends of the defendant. Counsel argued that evidence gained in such interviews would shed new light on the conclusions reached by the commission.

We are unable to say the trial judge abused his discretion in refusing to order an additional investigation into the sanity of the defendant at the time of the offense.

The defense presented no witnesses in support of its motion whose testimony might cause reconsideration by the commission of their conclusions. The only non-medical witness was presented by the State, and his testimony was contrary to the arguments raised by defense counsel. While this Court is sensitive to the plight of an indigent who must rely on findings of a sanity commission appointed by the court to examine him, *State v. Bennett*, 345 So.2d 1129 (La.1977) (on rehearing), the trial court is not required to reappoint sanity commissions until one produces a result with which the defendant agrees. See *State v. Haley*, 353 So.2d 1011 (La.1977).

Finding the trial court committed no error in denying the motion for further psychiatric examination, assignment No. 2 is without merit.

Assignment No. 5

[10] By this assignment of error, the defense argues that the trial court was in error in denying a motion to set aside trial fixing. The issue presented by this assignment is whether the filing of a "separate" or "severed" indictment by the State, without an order by the court, requires re-arraignment.

Defendant and his brother were charged by joint indictment and arraigned as co-defendants on January 19, 1978. On March 31, 1978, the State announced in court its intention to try the defendant separately. At the same time, it informed counsel for the defense that it would file a separate indictment against defendant for the same crime charged in the joint indictment. The defense offered no objection to this procedure. Subsequently, the defense filed a motion to set aside the fixing of trial date, claiming that the filing of the separate indictment against the defendant constituted a new indictment and, therefore, required that the defendant be re-arraigned. This motion was denied on April 6, 1978.

Article 704 of the Louisiana Code of Criminal Procedure, in pertinent part, provides:

"Jointly indicted defendants shall be tried jointly unless:

"(1) The state elects to try them separately; or

"(2) The court, on motion of the defendant, and after contradictory hearing with the district attorney, is satisfied that justice requires a severance."

Article 705 provides:

"When the court has ordered severance of an indictment, the district attorney shall file separate indictments.

"In the case of a grand jury indictment, no further action by the grand jury is required. Severed indictments shall be considered as filed on the date of the filing of the original indictment. Proceedings under the original indictment are not affected by the severance except insofar as they may be inconsistent with some other provision of this Code. The effects of a severance, as stated in this article, apply to severances under Articles 532(3) and 704."

The defense seeks to draw a distinction between the two articles and argues that the State's power to try separately under a joint indictment under Article 704 is not the power to sever for the purposes of Article 705. Counsel claims that only the trial court has the power to "sever" under Article 705. Since what occurred in this case was not "severance," then the provision of Article 705 regarding the filing of separate indictments does not apply. The argument concludes that since the State did not have the power to "sever" under Article 705, by filing a separate indictment the State actually indicted the defendant on a new charge, for which he has the right to be arraigned.

The assignment lacks merit. We do not understand how the filing of a "severed" or "separate" indictment against a defendant by the State after the State has announced its intention to try jointly indicted defendants separately could be prejudicial to a defendant. The charge under the severed

indictment was the same as that under the joint indictment and the defendant had already been arraigned under the joint indictment.

In *State v. Bluain*, 315 So.2d 749 (La. 1975), the defendant was arraigned under an original indictment which charged that the defendant committed "the crime of aggravated crime against nature as defined in R.S. 14:89.1 in that he did have unnatural carnal copulation with [the victim]." Prior to trial, the District Attorney was allowed to substantively amend the indictment to describe the unnatural sex acts charged that constituted the violation of the statute. The defendant argued that he was entitled to be rearraigned on the amended indictment. In that case we held:

> "The function of an arraignment is to notify the defendant of the charge against him. LSA—C.Cr.P. Art. 551. Defendant was arraigned on the original indictment. His plea of not guilty also applied to the amended indictment, since the amendment was designed to cure deficiencies and not to alter the nature of the crime. [Citations omitted]. Under these circumstances, rearraignment was unnecessary." (*State v. Bluain*, 315 So.2d at 752)

We find our decision in *Bluain, supra*, to be analogous to the case at bar. Certainly there is no conceptual bar to allowing the State to proceed under a separate indictment following severance of a joint indictment without rearraigning the defendant since it is authorized under Article 705.[4] Further, in this case there is no doubt that the separate or severed indictment charged the same offense as the joint indictment under which the defendant had previously been arraigned. Hence, the defendant was adequately notified of the charge against him. Finally, while counsel for defense claims that the procedure adopted by the State was improper, he fails to make any allegations as to how the procedure prejudiced the defendant.

For all of the above reasons, we find this assignment to be without merit.

Assignment of Error No. 7

By this assignment, the defense contends that the trial judge was in error in failing to grant three challenges for cause made by the defense relating to prospective jurors, Mrs. Flossie Berard, Camille Brigante and Kenneth Romero.

[11, 12] LSA–C.Cr.P. art. 797, in pertinent part, provides:

> "The state or the defendant may challenge a juror for cause on the ground that:
>
> "(1) The juror lacks a qualification required by law;
>
> "(2) The juror is not impartial, whatever the cause of his partiality. An opinion or impression as to the guilt or innocence of the defendant shall not of itself be sufficient ground of challenge to a juror, if he declares, and the court is satisfied, that he can render an impartial verdict according to the law and the evidence;
>
> "(3) The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict;
>
> "(4) The juror will not accept the law as given to him by the court . . . ."

LSA–C.Cr.P. art. 800, in pertinent part, provides:

> "A defendant cannot complain of a ruling refusing to sustain a challenge for cause made by him, unless his peremptory challenges shall have been exhausted before the completion of the panel."

4. Justice Barham, concurring in *State v. St. Andre*, 263 La. 48, 267 So.2d 190 (1972), and dissenting in *State v. Williams*, 263 La. 755, 269 So.2d 232 (1972), argued that the State is required to file separate indictments whenever jointly indicted defendants are tried separately. However, a majority of this Court has not adopted that position.

Under this article, there is no doubt that the defendant need only show two things to obtain reversible error: (1) that the trial judge erred in refusing to sustain a challenge for cause by the defendant; and (2) that he exhausted all of his peremptory challenges. *State v. Monroe*, 366 So.2d 1345 (La.1978); *State v. McIntyre*, 365 So.2d 1348 (La.1978); *State v. Qualls*, 353 So.2d 978 (La.1977); *State v. Ballard*, 337 So.2d 481 (La.1976). The trial judge is vested with broad discretion in ruling on a challenge for cause, which ruling will not be disturbed on appeal absent a showing of abuse. *State v. Monroe, supra; State v. McIntyre, supra; State v. Drew*, 360 So.2d 500 (La.1978); *State v. Crochet*, 354 So.2d 1288 (La.1977). In reference to the trial judge's great discretion in this area, this Court noted in *State v. Passman*, 345 So.2d 874 (La.1977), the following:

> "We have repeatedly held that the trial judge is vested with broad discretion in ruling on challenges for cause, and only where it appears, upon review of the voir dire examination as a whole, that the judge's exercise of that discretion has been arbitrary or unreasonable, resulting in prejudice to the accused, will this Court reverse the ruling of the trial judge. . . ." (345 So.2d at 880)

With these basic principles in mind, we turn to review the rulings of the trial court on each juror in question.

MRS. FLOSSIE BERARD

[13] In voir dire, it was determined that Berard's niece was married to David Bourque, the brother of Loretta Bourque, one of the victims in this case. Also, her mother and father were old friends of the LeBlanc family (the family of the other victim) and Berard had known David LeBlanc since he was a baby. At the time he was killed, David LeBlanc was employed by another of Mrs. Berard's brothers. Finally, it was brought out that her brother was serving, at the time, as Sheriff of St. Martin Parish, the parish where the abductions occurred.[5]

On examination by the State, she stated that she did not believe that the fact that her family had known the LeBlanc family for so long would affect her ability to be impartial and that she would decide the case entirely upon the evidence presented in court. She stated that she had not discussed the case with any of the members of the two victims' families, or with her brother, the Sheriff. She admitted knowing some deputy sheriffs other than her brother but testified that she would not be unduly influenced by the testimony of a person simply because he was a deputy sheriff and would judge their credibility in the same manner as she would any other person. She unequivocally stated that no individual, or group of individuals, outside the courtroom would influence her in any way.

Examination by the defense disclosed that Mrs. Berard had lived in New Iberia for 28 years, had three children, ages 26, 23 and 21, and was a housewife. She was a graduate of Spencer's College and subscribed to and read regularly both the *Daily Iberian* and *Times Picayune* newspapers. Also, she had previously served on a jury in federal court.

In response to questions regarding the marriage of her niece to Loretta Bourque's brother, David Bourque, she testified that she could not recall how long they had been married. She stated that they had visited each other's homes in the past but that normally when she visited her niece, David would not be home. She again acknowledged that her family had always considered the LeBlanc family to be very close. She stated, in response to a question from defense counsel, that in spite of her connections with the victims, she believed she could be 100 percent impartial toward the

5. Mrs. Berard also stated that another brother who was unemployed may have at one time been a special deputy but she was not sure.

defendant. Mrs. Berard stated that she did not know whether the defendant was guilty or not since she had not heard the evidence. All she knew was what she had read in the paper and she considered the paper to be unreliable. The final exchange occurred as follows:

"Q. But even taking all of that into consideration, you feel that you could be one hundred percent impartial?

"A. Right.

"Q. And decide this matter solely on the evidence to be produced?

"A. Right.

"Q. And if the defendant chose not to produce any evidence—

"A. Oh yeah, but—well, I know that, cause the case I went to, the one that they were trying, he did not get on the witness stand.

"Q. You didn't infer anything from that?

"A. No.

"Q. You understood he had the absolute right not to take the stand?

"A. That's right, they told us that same thing as Judge Bienvenu told us.

"Q. And it didn't make a difference in your vote on a verdict on that trial, nor—

"A. No, cause that's the first thing they told us when they chose us.

"Q. Thank you very much."

Defendant claims that the trial court should have upheld his challenge for cause on the basis of Article 797(3):

"The relationship, whether by blood, marriage, employment, friendship, or enmity between the juror and the defendant, the person injured by the offense, the district attorney, or defense counsel, is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict."

We are unable to conclude that the trial judge abused his discretion in denying the challenge for cause. Our reading of the voir dire examination as a whole discloses that Mrs. Berard showed herself to be an educated, intelligent and reasonably articulate individual who was quite candid in admitting the connection she had with the victims. She also acknowledged that her brother was the Sheriff in neighboring St. Martin Parish. However, throughout the entire voir dire she was unequivocal in her statements that she had no preformulated opinions of guilt, that she could decide the case solely upon the evidence presented in court and that she did not feel any pressure from anyone outside the courtroom which might influence her judgment.

[14] The fact that a prospective juror knows the victim of an offense is not in itself sufficient grounds for a challenge for cause under Article 797. *State v. Crochet*, 354 So.2d 1288 (La.1977); *State v. Clark*, 340 So.2d 208 (La.1976); *State v. May*, 339 So.2d 764 (La.1976); *State v. Higginbotham*, 261 La. 983, 261 So.2d 638 (La.1972); *State v. McClure*, 258 La. 999, 249 So.2d 109 (1971); *State v. Blanton*, 312 So.2d 329 (La. 1975). The defense must show that the juror's acquaintance with the victim is such that it is reasonable to conclude that it would influence the juror in arriving at a verdict. *State v. Clark, supra; State v. May, supra.*

In *State v. Rogers*, 241 La. 841, 132 So.2d 819 (1961), *cert. denied*, 370 U.S. 963, 82 S.Ct. 1589, 8 L.Ed.2d 830, the defendant was charged with the murder-rape of the wife of a local grocer in Reddell, Louisiana.[6] The victim was found murdered in the family grocery store. Defendant appealed the trial court's refusal to grant his challenge for cause of a prospective juror named Fred Bordelon. Examining the portion of the transcript touching on the juror in question, we noted:

"On voir dire, Fred Bordelon, a resident of Evangeline Parish for forty-six years,

6. A small town in Evangeline Parish.

stated that he was in the wholesale grocery business and sold merchandise to Lumney Guillory, a childhood friend of his and husband of the deceased; that he had known the victim for about ten years before her death, but that this fact would not alter his decision if he were selected on the jury panel. Mr. Bordelon testified that he had discussed the instant offense slightly with relatives and friends, but that he had no fixed opinion about the case; that his decision would be no different in the instant matter from a decision he would make if a white person were on trial for killing a colored individual. This prospective juror affirmed that he felt that he could arrive at a proper decision after weighing the evidence presented." (132 So.2d at 836)

The evidence also established that Bordelon had himself been robbed at his store four or five times in the past. In that case this Court refused to disturb the ruling of the trial court rejecting defendant's challenge for cause.

We believe the prospective juror's contacts with the victims in this case are no greater than those exhibited in *State v. Rogers, supra*, above. It is clear that the relationship of Mrs. Berard to the victims in this case does not place the prospective juror within Article 797(3) so clearly as did the facts in *State v. Monroe, supra*, and *State v. McIntyre, supra*, recently decided by the Court. We find that Mrs. Berard's relationship to the victims, considering the testimony of the prospective juror, was not so close that one might reasonably conclude that it would have influenced her in arriving at a verdict. See, also, *State v. Crochet, supra; State v. Blanton, supra; State v. Hodgeson*, 305 So.2d 421 (La.1974); *State v. Taylor*, 282 So.2d 491 (La.1973), reversed on other grounds, 419 U.S. 522, 95 S.Ct. 692, 704, 42 L.Ed.2d 690 (1975); *State v. Richmond*, 278 So.2d 17 (La.1973); *State v. Rideau*, 242 La. 431, 137 So.2d 283 (1962), reversed on other grounds, 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663.

[15] Relationship to law enforcement officers does not necessarily require a challenge for cause. *State v. Qualls, supra; State v. Madison*, 345 So.2d 485 (La.1977). In *State v. Calloway*, 343 So.2d 694 (La. 1976), where the prospective juror sought to be challenged had a nephew who was a police officer, this Court said:

> "It is well settled that the relationships to persons who might be prejudiced does not, 'ipso facto' disqualify a person from serving as a juror. The connection must 'be such that one might reasonably conclude that it would influence the juror in arriving at the verdict.' . . ." (*State v. Calloway, supra* at 696)

Mrs. Berard's brother was the Sheriff in St. Martin Parish. The trial in which she was asked to participate took place in Iberia Parish. While the St. Martin Parish Sheriff's Office did have some involvement in investigating the criminal activity of the defendant in St. Martin Parish, Mrs. Berard testified unequivocally that her brother never discussed the case with her or other members of her family. While we recognize the closeness of this issue, we conclude, after careful review of the voir dire examination as a whole, that the juror's state of mind was not such that she would have been unable to render impartial justice in this case.

We, therefore, find no abuse of discretion in the trial judge's refusal to grant defendant's challenge for cause regarding Mrs. Berard.

CAMILLE BRIGANTE

[16] During the voir dire examination, Brigante initially testified that he was familiar with the facts of the case, that he believed the defendant to be guilty based upon what he had read in the paper and that he would require the defendant to present some evidence in order to change his opinion. After instruction by the judge, Brigante acknowledged that he understood the principles of burden of proof, presump-

tion of innocence and reasonable doubt. He also stated that he believed he could set aside his prior opinion, consider only the evidence presented in court and render a fair and impartial verdict. He further stated he would accept the law as given to him by the trial judge.

As stated above, this Court will not set aside a trial court's ruling unless it appears, upon review of the voir dire examination as a whole, that the judge exercised his discretion in an arbitrary and unreasonable manner that results in prejudice to a defendant. *State v. Webb*, 364 So.2d 984 (La.1978); *State v. Passman, supra; State v. Madison, supra*. In *State v. Passman*, when faced with a similar challenge, we held:

> "A trial judge's refusal to excuse a prospective juror for cause is not an abuse of his discretion, notwithstanding that the juror has voiced an opinion seemingly prejudicial to the defense, where subsequently, on further inquiry or instruction, he has demonstrated a willingness and ability to decide the case impartially according to the law and the evidence. [Citations omitted]" (*State v. Passman*, 345 So.2d at 880)

See, also, *State v. Gray*, 351 So.2d 448 (La. 1977).

A full review of the examination of Brigante renders inescapable the conclusion that Brigante was "rehabilitated," and his earlier testimony that he had formulated an opinion must give way to his later positive and unequivocal testimony that he would be impartial, accept the law as given to him by the court and decide the case wholly upon evidence presented at the trial. We find no error in the trial court's denial of defense counsel's challenge for cause of Brigante.

KENNETH ROMERO

Romero testified he was a radio announcer for KANE Radio in New Iberia. He testified that he had read news broadcasts relating to the crime and the pre-trial proceedings. He stated that while he was familiar with the case, he had formulated no opinion regarding the defendant's guilt or innocence, could accept the law as given by the court and would decide the case solely on the evidence produced at the trial.

Defendant claims that because Romero candidly remarked that if he were the defendant he would have reservations about someone in his position serving on the jury, the challenge for cause should have been granted. We disagree.

[17, 18] It is well settled that the mere fact that a prospective juror has knowledge of facts surrounding the occurrence of the offense does not necessarily make him subject to a challenge for cause. It is clear that Romero had no more knowledge of the offense than any other person who may have read the newspaper or listened to the radio. He testified that all he did was *read* the newscasts and took no part in investigative reporting at all. More important, he testified unequivocally that he had no preformulated opinion regarding the defendant's guilt or innocence at all.

Regarding defendant's second contention, Romero did not say he believed himself to be partial, he simply related, at the request of defense counsel, that *if he were the defendant*, he would have some doubts about his impartiality. We think this observation is not probative in the least as to whether Romero actually could be impartial. We find nothing in his testimony to warrant the conclusion that Romero could not have been an impartial juror. We conclude that the trial judge properly denied the challenge for cause as to Romero.

Since the defendant has failed to show that the trial judge erred in denying any of defendant's challenges for cause, we find no reversible error in this assignment.

Assignment No. 8

By this assignment, defendant argues that the trial court was in error in admitting a photograph of the victims into evidence.

[19] In Louisiana, the admissibility of gruesome or inflammatory photographs is

determined by weighing the probative value of the picture against any possible prejudicial effect it may have on the jury. E. g., *State v. Scott*, 337 So.2d 1087 (La.1976); *State v. Hollingsworth*, 337 So.2d 461 (La. 1976); *State v. Cooper*, 334 So.2d 211 (La. 1976).

[20] In this case the photograph was offered to prove the identity of the victims, the position of the bodies and to explain why some of the brass casings that were fired were not found. There is nothing gruesome about the photo. There are no wounds or blood visible on the two victims. The defendant's sole claim is that the photo is inflammatory in that it appears to show the two victims were holding hands.

The defense offered to stipulate the position of the bodies and that the persons in the photos were the dead victims. The State declined the stipulation and the photo was admitted by the trial judge.

We conclude that the trial judge did not abuse his discretion in admitting the photo in question. The photo was highly relevant to establish a killing beyond a reasonable doubt and to prove details and clarify questions in the minds of the jury. See *State v. Hall*, 256 La. 336, 236 So.2d 489 (1970). This is so particularly in light of the fact that the defendant testified on his own behalf and contradicted some of his earlier statements. The photo is certainly not gruesome. It shows two persons lying face down on the ground. There are no visible wounds, blood or indications of violence. While one may speculate that the victims might be holding hands in the photo, it is not patently obvious. Even if it were, we would, nevertheless, be inclined to find that whatever slight inflammatory qualities this feature may produce are outweighed by the probative value of the photograph. We find this assignment lacks merit.

Assignment No. 9

By this assignment, the defense argues that the trial court was in error in denying a motion to suppress three confessions made by defendant.

A hearing was held on the motion to suppress these confessions during trial. The following evidence was adduced: Seven police officers arrested defendant on December 1, 1977. Because Helen Sonnier had told the officers that defendant was armed and would not "be taken alive," they were heavily armed. Defendant was arrested without incident when he returned to his place of employment after making a trip to Beaumont. When he was arrested, defendant was orally informed of his rights as required by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Defendant stated that he understood the charges against him and understood his rights. He was then transported to the Iberia Parish Courthouse.

Defendant was booked and taken to the Sheriff's Office where he was questioned by Major Horace Comeaux and Lieutenant Russell Duplantis. Both men testified that defendant was not threatened or offered any inducements to talk. Defendant was told that he did not have to speak if he did not want to and was asked if he had been advised of his rights and whether or not he understood them. Defendant replied affirmatively. At first, defendant denied any knowledge of the murder. Comeaux told defendant that a statement from him was not necessary because his brother, already in custody, had given police a statement, and that the guns used during the crime had already been recovered. Defendant then gave a statement, which was written down by Comeaux. After the statement was completed, defendant read the written confession as Comeaux had written it and signed each page (Comeaux and Duplantis also signed).

Defendant was then taken to Lafayette Parish jail. While enroute, he made a statement that he was glad to get it over with. He also stated that the murders would not have occurred if his brother had not seen the victims' automobile. He was also extremely angry at his brother for having confessed and stated that when he

got to Angola he would send him home to his mother "with a tag on his toe." The officers traveling with defendant testified this statement was completely spontaneous and that at no time was the defendant threatened, coerced, or induced into making it.

The next day, defendant made a statement that was recorded in the presence of three officers. Defendant was advised of his *Miranda* rights and signed a waiver. He was advised that everything was being tape recorded. He confessed, not only to the crime for which he was on trial, but also a number of other crimes which had been committed in the same area and manner but during which no one had been injured or killed. The officers who were present when the statement was made testified that it was made freely and voluntarily.

[21] In brief to this Court, the defense argues that these statements should have been suppressed because defendant was intimidated by the number of officers and by the number of firearms that they carried. At the hearing, the defense also argued that the taped confession should have been suppressed because portions of it had been deleted.[7]

[22-24] The State must establish beyond a reasonable doubt that a confession or inculpatory statement was made freely and voluntarily before it can be introduced at trial. LSA-C.Cr.P. art. 703(C); LSA-R.S. 15:451; e. g. *State v. Hebert*, 356 So.2d 991 (La.1978); *State v. Adams*, 347 So.2d 195 (1977). Furthermore, if the statement was obtained during custodial interrogation, the State must show that the accused was advised of his constitutional rights (*Miranda*). *State v. Hutto*, 349 So.2d 318 (La.1977); *State v. Haynes*, 339 So.2d 328 (La.1977). The admissibility of the statement is for the trial judge to determine and his conclusions as to the credibility and weight of the testimony relating to the voluntariness of the statement will not be overturned unless they are unsupported by the evidence. E. g. *State v. Simmons*, 340 So.2d 1357 (La. 1976); *State v. Hills*, 337 So.2d 1155 (La. 1976).

[25] The evidence presented by the State was overwhelming that the confessions were freely and voluntarily made and were not given as a result of fear, duress, intimidation, menaces, threats, inducements or promises. There was no evidence presented at the hearing to support defendant's argument that the confessions were not freely and voluntarily made. Counsel's bare assertion that the confession was not free and voluntary because the defendant was arrested by seven armed officers is totally unconvincing in light of the contrary evidence contained in the record. The statements were made some time after the defendant's arrest in the presence of only two detectives (who were armed with weapons concealed by their clothing). The defense offered no evidence of any threats, coercion or inducements to contradict the testimony of the witnesses for the State.

The circumstances surrounding the taking of the confession support the trial judge's conclusion that the State met its burden of proving the confessions were voluntarily made. We find this assignment lacks merit.

Other Assignments

[26] Assignment of error No. 11 regarding the trial judge's charge to the jury regarding principals was neither briefed nor argued before this Court and, therefore, is considered abandoned. *State v. Wientjes*, 341 So.2d 390 (La.1976); *State v. Phillips*, 337 So.2d 1157 (La.1976); *State v. Mat-*

7. The defense abandoned this argument in brief to this Court. LSA R.S. 15:450 requires that a confession be used in its entirety. This Court has held that when a statement refers to other crimes, a defendant has the option of having only that portion of the statement which pertains to the instant offense submitted as evidence or having the whole statement introduced. Defendant cannot have the entire confession suppressed if it is otherwise admissible. See *State v. Snedecor*, 294 So.2d 207 (La.1974).

thews, 292 So.2d 226 (La.1974). We have also carefully considered defendant's assignments of error Nos. 4, 6, 10 and 12. We find that none of these assignments of error present reversible error, nor do any involve legal issues not governed by well established principles of law. Therefore, assignment Nos. 4, 6, 10 and 12 are rejected as having no merit.

SENTENCE

(1) Assignments of Error

Assignment No. 1

By this assignment, the defendant claims that there is no provision in the law which requires that the State give the defendant notice of which aggravating circumstances the State will rely on in seeking the death penalty. He argues that this failure violates his rights to due process of law and denies him sufficient opportunity to prepare a defense.

[27, 28] Unquestionably, the need for reliability in the determination of whether to impose the death penalty by adversary proceedings demands that an accused be afforded full rights of due process. Accordingly, a defendant is entitled in a capital sentencing proceeding, no less than in the guilt or innocence trial, to be informed of the nature and cause of the accusation against him, LSA–Const. art. 1, § 13 (1974), and to his Fifth Amendment right to "[n]otice . . . given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and '[setting] forth the alleged misconduct with particularity.'" *In Re Gault*, 387 U.S. 1, 33, 87 S.Ct. 1428, 1446, 18 L.Ed.2d 527, 459 (1967). Thus, the defendant is entitled to know the aggravating circumstances which the prosecution will seek to prove sufficiently in advance of court proceedings so that reasonable opportunity to prepare will be afforded.

[29] The defendant lacks standing to raise this issue. He has not alleged that he was *not* informed of which aggravating circumstances on which the State would rely, nor does the record disclose that he made any attempt to obtain such information. Had such showings been made, the issue would be properly before this Court. We find this assignment to be without merit.

Assignment No. 2

[30] By this assignment, defendant claims that Louisiana Code of Criminal Procedure Article 905.3 places the burden on the defendant to explain why he should not be given the death sentence.

We find this argument totally unpersuasive. Article 905.3 provides:

> "A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. . . ."

This article places on the State the burden to prove beyond a reasonable doubt that at least one or more statutory aggravating circumstances exists. If the jury finds the State has not done so, it may not consider the penalty of death. The fact that the district attorney in some cases, may at the sentencing portion, simply ask the jury to consider evidence already introduced at the guilt portion in making its determination of the existence of any statutory aggravating circumstance does not reduce the burden of proof placed upon the State. We find this assignment without merit.

Assignment No. 3

[31] By this assignment, the defendant claims that the portion of Article 905.2 which permits the jury to consider "any evidence offered at the trial on the issue of guilt" injects into the proceeding an element of arbitrariness.

Our statutory scheme is structured so that the jury's discretion is "controlled by clear and objective standards so as to pro-

duce non-discriminatory application." *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976). The objective standards referred to are the statutory aggravating circumstances listed in Article 905.4. The United States Supreme Court noted approvingly in *Gregg v. Georgia, supra*, 96 S.Ct. at 2936, that in addition to the requirement that the jury find beyond a reasonable doubt that at least one statutory aggravating circumstance exists, the jury was also authorized to consider any other appropriate aggravating or mitigating circumstances.

Thus, even were we to construe the quoted language in the manner that the defendant requests, we would, nevertheless, conclude that such a construction has been constitutionally approved. This assignment is without merit.

Assignment No. 4

By this assignment, the defendant claims the trial judge erred in giving an improper instruction to the jury. While the jury was deliberating on the sentence, they sent a message out that they had several questions they desired answered. One such question, as read into the record by the trial judge, was as follows:

> "Pertaining to life sentence, life imprisonment without benefit of probation, parole, or suspension of sentence. Being cautious, the jury would like to know if the defendant will be eligible for work release programs, or Governor's pardon."

The trial court informed the jury that the Governor may exercise his executive right to pardon any crime, no matter what the sentence. No complaint is made of this portion of the charge. After consultation with attorneys for both the State and the defense, and with the full consent of both, the judge charged the jury regarding the defendant's potential eligibility for work release as follows:

> "With regard to the question about work release, I'll read to you now from Section one one one one of Title fifteen of our Revi[s]ed Statutes. Paragraphs A and B of that section I think are applicable to your question. I'll read only paragraphs A and B. A, the Louisiana Department of Institutions is hereby authorized to establish and administer a work release program for inmates of any institution under the jurisdiction of the Department. B, the Department shall establish rules for the administration of the work release program, and shall determine those inmates who may participate in the release program, notwithstanding any provision of law to the contrary. Any convict sentenced to imprisonment at hard labor shall be eligible at any time during his sentence to participate in the work release program, subject to the provisions of this part. If any inmate violates the conditions prescribed by the Department, his work release privileges may be withdrawn. Failure to report to, or return from the planned employment shall be considered an escape under the provisions of Revised Statutes 14:110. The Department may approve as work release privileges placement in universities, colleges, technical vocational or trade schools, or in sheltered workshops, or in training programs designed to improve the skills and abilities of the inmate. That's the end of B. Now, I want to add this. We do not have available for your consideration at this time the 'rules' discussed in paragraph B that I have just read to you. Does that answer that question?" (Record, pp. 1839-1841)

Counsel for the defendant argued before this Court that he erred in agreeing to the charge. He claims that the sole reason the jury later returned the sentence of death was they feared that one day the defendant may return to Iberia Parish through the work release program and that this was an improper factor for the jury to take into consideration.

We have no way of knowing what effect, if any, the charge had on the jury's verdict. We do know that the jury found one or

more aggravating circumstances. It is most difficult to consider the jury's request for such an instruction as arbitrary. In the interest of a perfect trial, as distinguished from a fair trial, 20-20 hindsight would direct us to advise the trial judge to consider only our rules on sentencing guidelines and no other. Nevertheless, should we speculate, it is reasonable to speculate that the jury wanted to know whether life meant life and balance this fact against the aggravating circumstances which justify the death penalty.

This assignment is without merit.

(2) Capital Sentence Review

The defendant was tried in accordance with the provisions of Louisiana Code of Criminal Procedure Article 905.1–905.9 (1976), which provides for a bifurcated trial in capital cases. At the conclusion of the sentencing hearing, the jury returned a unanimous recommendation that the defendant be sentenced to death on each murder charge. On April 25, 1978, the trial judge followed the binding recommendation of the jury and sentenced Elmo Sonnier to death on both counts.

Article 905.9 of the Code of Criminal Procedure requires us to review every sentence of death to determine if it is excessive. That article also mandates this Court to establish procedures to satisfy constitutional criteria for that review. Pursuant to this authorization, we adopted Supreme Court Rule 28, § 1, on Review Guidelines, which provides:

"Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:

"(a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and

"(b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and

"(c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

This is the same procedure for review authorized by Georgia statute approved by the United States Supreme Court in *Gregg v. Georgia, supra*. To aid us in this review, we have been furnished a complete transcript of the record of the sentencing portion of the trial, a Sentence Investigation Report, a Uniform Capital Sentence Report, and a memorandum on behalf of the defense regarding the propriety of the sentence, all in accordance with the capital sentence review requirements adopted by this Court.

Passion, Prejudice or Arbitrary Factors

[32] Counsel for defense claimed the sentence was the result of passion and prejudice by reiterating the arguments advanced by him in support of the motion for change of venue. As noted above, we find those claims to be without merit.

Our complete review of the record, both of the guilt and sentencing portions, together with the capital sentencing report submitted by the trial judge, leads us to conclude that the jury was not influenced by passion, prejudice or any other arbitrary factors.

Aggravating Circumstances

[33] The jury found the following aggravating circumstances to have existed:

(1) The offender was engaged in the perpetration or attempted perpetration of aggravated kidnapping.

(2) The offender was engaged in the perpetration or attempted perpetration of aggravated burglary.

(3) The offender was engaged in the perpetration or attempted perpetration of armed robbery.

(4) The offender knowingly created a risk of death or great bodily harm to more than one person.

(5) The offense was committed in an especially heinous, atrocious or cruel manner.

Article 905.3 provides:

"A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that *at least one* statutory aggravating circumstances exists and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed. . . ." (Emphasis supplied)

We read this section to mean that if the jury correctly finds that one statutory aggravating circumstance exists, it is empowered to consider the death penalty. As long as the jury is required to find at least one statutory aggravating circumstance, the jury's discretion is "controlled by clear and objective standards so as to produce nondiscriminatory application." *Gregg v. Georgia, supra*, 96 S.Ct. at 2936.

(1) *Armed Robbery.* The evidence clearly established that the two brothers were armed with a dangerous weapon when they approached the victims' vehicle and confiscated the driver's licenses of the young couple. According to the defendant, the licenses were later destroyed. The evidence also suggested that the victims' wallets had been rifled and thirty or forty dollars was unaccounted for. Finally, the defendant admitted to taking a jack from the victims' vehicle. The jack was later recovered from the trunk of defendant's car.

[34, 35] Armed robbery is defined as "the theft of anything of value from the person of another or which is in the immediate control of another by force or intimidation while armed with a dangerous weapon." We feel there was sufficient evidence from which the jury could have concluded that armed robbery was an aggravating circumstance.

[36] (2) *Aggravated Burglary.* R.S. 14:60, in pertinent part, defines aggravated burglary as follows:

"[T]he unauthorized entering of any inhabited dwelling, or of any structure, water craft, or movable where a person is present, with the intent to commit a felony or any theft therein, if the offender,

"(1) is armed with a dangerous weapon . . . ."

The evidence showed that when the Sonnier brothers first accosted the couple one, or both, of them entered the LeBlanc vehicle without permission while armed with a 22-caliber rifle. The testimony of both the defendant and his brother also established beyond any reasonable doubt that the defendant and his brother, at the very least, had the intent to commit simple kidnapping when they entered the victims' vehicle. Since simple kidnapping is a felony, we need not decide at this point whether the jury could have found that the defendant also intended to commit rape, armed robbery and murder when he made the unauthorized entry. There was sufficient evidence from which the jury could have concluded that aggravated burglary was an aggravating circumstance.

(3) *Aggravated Kidnapping.* R.S. 14:44 provides:

"Aggravated kidnapping is the doing of any of the following acts with the intent thereby to force the victim, or some other person, to give up anything of apparent present or prospective value, or to grant any advantage or immunity, in order to secure a release of the person under the offender's actual or apparent control:

"(1) The forcible seizing and carrying of any person from one place to another . . . ."

[37, 38] There is no question that the record supports the conclusion that the defendant forcibly seized and transported the victims from one place to another. We believe the evidence also fairly supports the conclusion that Loretta Bourque engaged in sexual intercourse with one or both of the Sonnier brothers in exchange for a promise that both she and David LeBlanc would be released unharmed. Eddie Sonnier testified that this was the condition under which he was able to have intercourse with the female victim. The primary issue to be resolved is whether "sexual gratification" is

something of "value" or an "advantage" under R.S. 14:44. We believe that it is. In *State v. Felton*, 339 So.2d 797 (La.1976), we were asked to determine whether sexual gratification was "anything of value or any acquittance, advantage, or immunity of any description" under R.S. 14:66 (Extortion). There, a police officer was found guilty of accosting a couple in their automobile and threatening to arrest them if they did not perform specified sex acts in his presence. He also forced the female victim to have intercourse with him under the same threat. In *Felton*, we held:

> ". . . [T]he crime of extortion is committed when, by the use of threats, the accused obtains from the victim performance (or non-performance) of a substantial act for the advantage (here, sexual gratification) of the accused." (339 So.2d at 799–800)

Likewise, we believe the crime of aggravated kidnapping occurs when an offender forcibly seizes and carries a person from one place to another with the intent to force the victim, or some other person, to perform a sexual act, or acts, for the advantage (sexual gratification) of the offender as a condition of the release of the person seized. *State v. Dickinson and McNemar*, 370 So.2d 557 (La.1979).

[39] We believe there was sufficient evidence from which the jury could conclude that the defendant and his brother abducted the couple with the intention of forcing the female victim to engage in sexual relations in order to secure the couple's safe release. There was no error in the jury's finding that aggravated kidnapping was an aggravating circumstance.

(4) *The offense was committed in an especially heinous, atrocious, or cruel manner.* This aggravating circumstance was also included in the Model Penal Code and has been adopted by a number of states other than Louisiana. The United States Supreme Court, in examining the same provision in a Florida statute, noted the following:

> "That Court [the Florida Supreme Court] has recognized that while it is arguable 'that all killings are atrocious . . . [s]till we believe that the Legislature intended something "especially" heinous, atrocious or cruel when it authorized the death penalty for first degree murder.' *Tedder v. State*, [Fla.,] 322 So.2d [908,] at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at 'the conscienceless or pitiless crime which is unnecessarily torturous to the victim.' *State v. Dixon*, [Fla.,] 283 So.2d [1,] at 9. See also *Alford v. State*, [Fla.,] 307 So.2d 433, 445 (1975); *Halliwell v. State*, supra [, Fla.,] 323 So.2d [557,] at 561. We cannot say that the provision as so construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases." (*Proffitt v. Florida*, 428 U.S. 242, 255–256, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913 [1976])

State v. Dixon, 283 So.2d 1 (Fla.1973), referred to approvingly by the Supreme Court in *Proffitt* involved a certification to the Florida Supreme Court from four lower courts regarding the constitutionality of the death statute in that state. The Florida court said:

> "The aggravating circumstance which has been most frequently attacked is the provision that commission of an especially heinous, atrocious or cruel capital felony constitutes an aggravated capital felony . . . Again, we feel that the meaning of such terms is a matter of common knowledge, so that an ordinary man would not have to guess at what was intended. It is our interpretation that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile; and that cruel means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to

set the crime apart from the norm of capital felonies—the conscienceless or pitiless crime which is unnecessarily torturous to the victim." (*State v. Dixon*, 283 So.2d at 9)

State v. Alford, supra, also approvingly referred to in text by the Court, involved a 13-year-old girl who was abducted and raped by the defendant. She was found blindfolded, with her hands tied behind her back, after having been shot to death execution style. The Florida Supreme Court affirmed a finding that the crime had been committed in an especially heinous, atrocious and cruel manner. The United States Supreme Court also approvingly referred to a number of other Florida cases in which the provision had been applied. Most notably among them was a case similar in some aspects to the case at bar. In *Douglas v. State*, 328 So.2d 18 (Fla.1976), the defendant kidnapped the victim and his wife and drove them via a circuitous route to a remote area where he made them undress and perform various sexual acts in his presence. The defendant then struck the victim in the head with a rifle with such force that it shattered the rifle stock. He then shot the victim three times in the back of the head. The female was then forced to perform various sexual acts upon and with the defendant. After recounting the evidence, the Florida court said:

". . . The abuse to which the victim was subjected to prior to his death and the manner in which he was killed was especially heinous, atrocious and cruel." (*Douglas v. State*, 328 So.2d at 21–22)

[40] In a companion case to *Proffitt v. Florida, supra*, and *Gregg v. Georgia, supra*, the Supreme Court in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), declared unconstitutional Louisiana's capital punishment statute. In response, our legislature passed the present statutory scheme which was modeled after the statute upheld in *Gregg v. Georgia, supra*. We believe the legislature clearly intended this Court to interpret the new capital punishment law with reference to the constitutionally-approved interpretations contained in *Gregg, Proffitt* and their companion cases.

In *State v. English*, 367 So.2d 815 (La. 1979), this Court suggested in dicta:

"[A]ny system that seeks to distinguish rationally among murders in terms of heinousness, must necessarily incorporate into that concept some idea of torture or the pitiless infliction of unnecessary pain on the victim. [Citing *Proffitt and Gregg*]" (367 So.2d at 823)

[41] Today, we adopt as part of our finding this interpretation. However, our analysis above leads us to conclude that the legislature intended that the torture or pitiless infliction of pain could be either physical or psychological. Certainly the homicides in *State v. Alford, supra*, and *Douglas v. State, supra*, referred to approvingly by the U.S. Supreme Court in *Proffitt, supra*, and discussed above, could only be described as heinous, atrocious and cruel because of the severe psychological trauma inflicted upon the victims before they were killed.

[42] In the instant case, the victims were seized at gunpoint around 1:00 A.M. in the morning while parking in a remote area of St. Martinville Parish. The evidence established that they were handcuffed, placed in the rear seat of their car and driven for twenty-one miles along back roads to a remote spot in Iberia Parish. Eddie Sonnier testified that David LeBlanc was taken into the woods and handcuffed to a tree while his girlfriend was taken a short distance away. After the defendant had finished raping the female victim, his brother had intercourse with her on a promise that the couple would be released unharmed. Eddie testified that the defendant returned and watched him and the girl have intercourse after leaving momentarily to check on LeBlanc. It is difficult to imagine the agony and suffering LeBlanc must have felt as he waited helplesly handcuffed to a

tree while his girlfriend was being raped only a short distance away. Of course, the ordeal must have been even more terrorizing for Bourque, who was forced to have intercourse with both of her abductors *in* order to secure a promise of safe release.

"Pitiless" and "conscienceless" are appropriate terms to describe the mental state of the defendant who forced the couple to lie side by side, face down, to be shot and killed in order to assure that neither could report the crime. The helpless victims were notified of their impending doom by a first shot which missed both of them. If the jury accepted the defendant's original version of the story, there was a delay following that shot while the defendant told Eddie Sonnier that he (Eddie) could not shoot and that he should hold the flashlight while the defendant did the shooting. Such utter indifference to the suffering of those two innocent youngsters as they waited to die could certainly be characterized as "cruel" within the meaning of our statute.

We believe that based upon the abuse that the evidence established that the victims were subjected to prior to their death and the manner in which they were killed the jury committed no error in finding the crime was committed in an especially heinous, atrocious and cruel manner.

[43] (5) *Risk of death or great bodily harm to more than one person.* In the appendix in *State v. English, supra*, we indicated that the better interpretation of this provision was that a single consecutive course of conduct, which creates a risk of death or great bodily harm to more than one person, is within the contemplation of the statutory language, and that the legislature probably did *not* intend for it to apply *only* when there is *one act*, i. e., shooting into a crowd (where the *same* act which caused the killing also created the risk of death or great bodily injuries to others). Today, we need only hold that where an offender kills two or more persons during a *single consecutive course of conduct* for the purpose of preventing any one of those killed from disclosing the murder of the other, or others, then the offender's conduct is within the contemplated statutory meaning. See *Proffitt v. Florida, supra*, 428 U.S. at 256, 96 S.Ct. at 2968; *Alvord v. State*, 322 So.2d 533 (Fla.1975).

[44] In the instant case, the evidence without doubt supports the conclusion that the defendant murdered the victims one after the other as part of a single consecutive course of conduct in order to prevent either victim from reporting to the police the rapes or the murder of the other victim. The jury committed no error in finding that a risk of death or great bodily harm to more than one person was an aggravating circumstance.

Conclusion

We find the evidence supports the jury's finding of all the statutory aggravating circumstances relied upon and set forth in their verdict.

Comparison with Other Cases

[45] Section 4(b) of Rule 28 of our Court rules requires the district attorney to include in his sentence review memoranda a synopsis of each first degree murder case in the district in which sentence was imposed after January 1, 1976. The purpose of this requirement is to aid this Court in determining whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Elmo Patrick Sonnier is a white male, age twenty-eight years (twenty-six at the time of the offense). He attended school through the seventh grade at which time he quit and went to work in the oil fields. The Wechsler Adult Intelligence Scale Test conducted on January 31, 1978, indicated a verbal I.Q. score of dull-normal range (84), a performance I.Q. score in the average range (98) and a full scale I.Q. in the aver-

age range (90). No neurological impairment was noted by the Bender-Gestalt Test. The Rorschach Examination indicated the defendant had contact with reality and there were indications of a potential for above average creativity and intelligence.

Sonnier's criminal record reveals five arrests as a juvenile: disturbance (no disposition); simple burglary and simple criminal damage (indefinite period of supervised probation); simple burglary (continued probation until April 24, 1967); fight (released); juvenile trouble (released). His adult record includes an attempted theft of a boat for which he was released. He was convicted on two counts of auto theft in 1968 and sentenced to four and three years at hard labor. (The sentences ran concurrently.) He was paroled in 1970. On July 7, 1970, he was arrested on a charge of theft by false pretenses but the case was dismissed. In November of 1970, he was arrested and charged with the theft of a shotgun and a television which resulted in his parole being revoked. During the period he was on parole, he was in trouble for non-support, and changing jobs and residences. Defendant served out his term at Angola and was discharged on March 10, 1972.

Defendant worked in the oil fields until 1975, except for the period he was at Angola. He worked on a hog farm in Texas for one year and returned to Louisiana in 1976. He was then employed by Hub Security until September of 1976 when he was fired because he had falsified his application for employment and his employer suspected he had stolen some money from a client. The defendant then took a job with B & B Security Police until March of 1977 when he began working for Jo-Dee Equipment Rental where he was employed at the time of his arrest. He was regarded by Jo-Dee as a reliable employee.

There have only been three other first degree murder prosecutions in Iberia Parish since January 1, 1976. James Lee Bullock, indicted for first degree murder, was found guilty of second degree murder and sentenced to life in prison. Bullock, described as a relatively small individual (weighing 125–140 pounds) beat an oil field worker (who weighed over 200 pounds) with a billy club with such force that it broke the club into several pieces. The incident occurred when the two men got into an altercation after the automobile in which they were riding with two other persons broke down in a desolate area of Iberia Parish. Bullock struck the victim repeatedly until the club shattered. He then relieved the victim of his wallet and told him to leave the area. As the victim attempted to do so, the defendant gouged him with a part of the broken club. The victim's body was found three days later. He died of a cerebral hemorrhage as a result of blows inflicted to the head. Bullock was twenty-three years of age at the time of the crime.

Frank Bennett was charged with the first degree murder of Leona Bartley on May 16, 1977, found guilty and sentenced to life imprisonment on the recommendation of the jury. The defendant had an argument with a member of the residence where he was living. As a result he was put out of the house and had to sleep in a washateria. The next day he went to a store and bought a handgun. He went to the residence and began firing the gun into the air and then went inside and beat the victim with the gun. As the victim ran outside to escape his attack, the defendant fired several shots at the victim, one of which hit the victim and killed her instantly. The defendant told police he went up to the victim to be sure she was dead. He said that if she had not been, he would have shot her again. The defendant also told the police that he was happy he had killed the victim. The defense called witnesses that day who testified the defendant "looked wild" on the day of the murder. Defense counsel argued in way of mitigation that the offense was committed while the offender was under the influence of extreme mental or emotional disturbance.

The only other first degree murder prosecution in the Sixteenth Judicial District

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since January 1, 1976, is that of Eddie James Sonnier, the brother of the defendant. Sonnier was convicted of two counts of first degree murder of David LeBlanc and Loretta Bourque and sentenced to death. His appeal is scheduled to be argued before this Court next term.

We do not believe either the *Bullock* or the *Bennett* convictions bear any similarity to the instant case. Both killings in those cases occurred after altercations between the victims and the defendants. Further, in *Bennett*, there was evidence that the defendant's conduct was influenced by an extreme mental or emotional disturbance. We are, therefore, unable to say that the sentence is disproportionate to the penalty in similar cases, considering both the crime and the defendant.

Conclusion

[46] Having found no evidence which suggests that the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and further having found sufficient evidence from which the jury could rightfully have concluded one or more statutory aggravating circumstances existed in this case, and finally having found the sentence is not disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, we conclude that the sentence of death is not excessive in the instant case.

DECREE

For the above and foregoing reasons, the conviction and sentence of the defendant are affirmed.

AFFIRMED.

DENNIS, Justice, concurring in part and dissenting in part.

I concur in the majority's affirmance of the defendant's conviction, but I respectfully dissent from its refusal to set aside the death penalty and order a new capital sentence hearing. Although the majority opinion fails to articulate standards of review for errors of fact and law in a capital sentence proceeding, it is evident that the standards applied by the majority in the instant case fall short of the minimum criteria necessary to assure due process of law in the imposition of the death penalty.

The penalty of death is qualitatively different from any other sentence. Because of that qualitative difference, a correspondingly greater need for reliability is called for in the determination that death is the appropriate punishment in a specific case. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

In applying the Louisiana "harmless error" rule, this Court has consistently held that in doubtful cases the doubt as to the prejudicial effect of the trial judge's error is resolved in favor of the accused. *See* La.C.Cr.P. art. 921, Official Revision Comment (c). In view of this standard, and the need for even greater reliability in capital cases, *see Lockett v. Ohio, supra*; *Gardner v. Florida, supra*; and *Woodson v. North Carolina, supra*, this Court cannot approve a death penalty in the face of an error in a capital sentencing hearing, unless it is convinced beyond a reasonable doubt that the mistake was inconsequential to the jury's recommendation. *See also, Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710 (1967) ("[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.").

The Due Process Clause and Article 1, § 2 of the 1974 Louisiana Constitution protect every accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime charged. *In Re Winship*, 397 U.S. 358, 90

S.Ct. 1068, 25 L.Ed.2d 368 (1970); *State v. Searle*, 339 So.2d 1194 (La.1976). It may be argued that in determining the sentence in capital cases an even more stringent instrument for reducing the risk of executions resting on factual error is needed. *See Lockett v. Ohio, supra*; *Gardner v. Florida, supra*; *Woodson v. North Carolina, supra*.

However, it is clear that a jury finding of an aggravating circumstance, as a matter of constitutional and statutory law, see La. C.Cr.P. art. 905.3, must be founded at least upon proof beyond a reasonable doubt. Furthermore, the critical inquiry in this Court's review of a capital sentence must be not simply to determine whether the jury was properly instructed on reasonable doubt, but to determine whether the record evidence can reasonably support a finding of an aggravating circumstance beyond a reasonable doubt. Cf. *Jackson v. Virginia*, — U.S. —, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

A reading of the majority opinion reveals that this Court has adopted standards of review that are inadequate to protect against misapplications of the constitutional standard of reasonable doubt and against influence of the jury's recommendation by error or other arbitrary factors. For the Court's decision leaves unrectified an erroneous instruction by the trial judge and other errors of law which more than likely influenced the jury's recommendation; as well as findings of fact which are not supported by the evidence beyond a reasonable doubt.

After the jury had been deliberating upon the sentence for some time it requested additional instructions on whether the defendant would be eligible for work release programs if he were sentenced to life imprisonment. The trial judge read La.R.S. 15:1111(A) and (B)[1] to the jury. The statute authorizes the Department of Corrections to establish rules for determining those inmates who may participate in work release programs. However, the trial judge told the jury that he did not have a copy of the regulations. Accordingly, the jury probably gathered that if it did not recommend that Sonnier be sentenced to death, he would receive a sentence of life imprisonment and possibly be eligible for work release programs in universities, colleges, vocational schools, sheltered workshops and other places. Shortly after receiving this instruction the jury returned and made its unanimous recommendation that the death sentence be imposed upon the defendant.

The trial judge's instruction was incomplete and misleading. At the time of Sonnier's trial the Department of Corrections' regulations provided that inmates convicted of murder in any degree, attempted murder or murder reduced to manslaughter as a result of a plea bargain, were not eligible for maintenance and work release programs. Department Regulation No. 30–14, State of Louisiana Department of Corrections (February 9, 1978). A few months after his trial La.R.S. 15:1111 was amended by Act No. 510 of 1978 so as, in effect, to

1. At the time of Sonnier's trial La.R.S. 15:1111, in pertinent part, provided:

"A. The Louisiana Department of Institutions is hereby authorized to establish and administer a work release program for inmates of any institution under the jurisdiction of the department.

"B. The department shall establish rules for the administration of the work release program and shall determine those inmates who may participate in the release program. Notwithstanding any provision of law to the contrary, any convict sentenced to imprisonment at hard labor shall be eligible at any time during his sentence to participate in the work release program, subject to the provisions of this Part. If any inmate violates the conditions prescribed by the department, his work release privileges may be withdrawn. Failure to report to or return from the planned employment shall be considered an escape under the provisions of R.S. 14:110. The department may approve as work release privileges, placement in universities, colleges, technical, vocational or trade schools or in sheltered workshops or in training programs designed to improve the skills and abilities of the inmate.

"• • •"

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prohibit first degree murderers from participating in any work release programs.[2]

The judge clearly erred in giving an incomplete instruction which implied that Sonnier would be eligible for work release in universities, colleges and other public places.[3] Since more than a reasonable doubt exists, in light of the events that transpired at the sentencing hearing, as to whether the jury was influenced by the error in recommending that Sonnier be sentenced to death, it is this Court's duty to set right the error by vacating the capital penalty and requiring a new sentencing hearing. *See* La.C.Cr.P. art. 905.1.

The opinion of the majority of this Court does not squarely confront the issue. It concedes that an error was committed, but obliquely indicates that the error was not prejudicial to the defendant's right to a fair trial without stating the standard of review which has been applied.

Although it is clear that the trial judge's misleading instruction requires reversal and retrial of the sentencing portion of defendant's case, it should be noted that this case points up a problem of constitutional dimensions with which we soon may be confronted. If jurors demonstrate a willingness to recommend the death penalty in certain cases merely because they lack confidence in the ability of the legal and correctional systems to protect society from a violent criminal, does not fairness and due process demand that the state remedy the deficiency in its laws or its corrections programs rather than put to death the defendants in those cases? Is it not unjust, unfair, cruel and excessive punishment to allow a defendant to be electrocuted when a jury does not think that the death penalty is truly appropriate but feels compelled to recommend it because it does not have faith in the state's ability to carry out a true life sentence? It seems evident that the use of capital punishment merely for the purpose of removing dangerous persons from society is excessive because this objective can be accomplished by imprisonment; and if a jury is moved to recommend the death penalty solely for this reason in a particular case the sentence should be set aside. The infinitely more difficult questions, however, are whether there is such a widespread lack of confidence in our laws and corrections programs as might impel juries generally to vote for the death penalty for no reason other than to remove violent criminals permanently from society; and, if so, whether the deficiencies in the legal and correctional systems are susceptible to correction.

In *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977), the Supreme Court held a punishment to be excessive and violative of the cruel and unusual punishment clause "if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime." Id. 592, 97 S.Ct. 2865. In a case in which the death penalty would not have been imposed but for the jury's fear that the defendant cannot be incarcerated for life, it would appear that the punishment would be cruel and unusual under either clause. In the first place, if one focuses upon the goal of retribution, the proportionality standard

2. La.R.S. 15:1111, as amended, provides that an inmate who has been convicted of first degree murder "shall be prohibited from participation in the work release program except during the last six months of his term." Since a sentence of life imprisonment without benefit of parole, probation, or suspension of sentence expires with the life of the inmate, work release is prohibited until six months before the death of such an inmate, an event not susceptible to accurate prediction.

3. The trial judge's instructions were disturbingly opaque on the subject of whether the jury *must* recommend the death penalty if it finds an aggravating circumstance to exist. It would seem highly desirable, if not essential, that the trial judge depart from the statutory language to make it abundantly clear that "[h]aving found an aggravating circumstance, however, the jury is not required to impose the death penalty." *State v. Payton*, 361 So.2d 866, 868 (La.1978).

and the first standard coalesce to bar the death penalty because the punishment is disproportionate to a crime if its sanctions are more severe than the criminal deserves. Because retributivists argue that the only acceptable justification of punishment is that criminals deserve it, punishing disproportionately would serve no acceptable goal of punishment. On the other hand, if one focuses upon the utilitarian aspects of punishment, the death penalty in such a case is cruel and unusual because it makes no measurable contribution to acceptable goals of punishment over and above that which might be accomplished by a true life sentence. Cf. Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. of Pa.L.Rev. 989, 1053 (1978).

In addition to the foregoing the majority committed several errors in reviewing the jury's findings of aggravating circumstances.

First, the majority erred in giving overly broad interpretations to the statutory categories of aggravating circumstances: "The offender knowingly created a risk of death or great bodily harm to more than one person," La.C.Cr.P. art. 905.4(d)—a phrase clearly intended to cover the knowing creation of risk of multiple deaths by one act such as shooting into a church congregation or exploding a bomb in an inhabited building; "[t]he offense was committed in an especially heinous, atrocious or cruel manner," La.C.Cr.P. art. 905.4(g)—a provision directed only at the conscienceless or pitiless crime which is unnecessarily tortuous to the victim. Today the Court adopts constructions expanding these categories to include any murder in which the victim witnesses the homicide of another and has foreknowledge of his own murder; and any murder which is part of a course of conduct designed to do away with witnesses to a homicide, even though the crimes may be widely separated in time and location. The majority's interpretations—which make every multiple murder fall within one or both categories—unreasonably expand the capital categories beyond the legislature's intention; and the statutory construction casts doubt upon the constitutionality of Louisiana's entire capital punishment scheme. *See Gregg v. Georgia*, 428 U.S. 153, 201, 202, 96 S.Ct. 2909, 2938, 2939, 49 L.Ed.2d 859, 890, 891 (1976); *Proffitt v. Florida*, 428 U.S. 242, 255, 256, 96 S.Ct. 2960, 2968, 49 L.Ed.2d 913, 924 (1976).

Second, the majority evidently employed the "some evidence" rule or another standard of review which is constitutionally inadequate to protect against misapplications of the criterion of reasonable doubt. The Supreme Court in *Jackson v. Virginia*, *supra*, specifically disapproved of use of a similar rule, the "no evidence" rule, for this purpose and held in a challenge to a state criminal conviction by federal habeas corpus that the proper inquiry on review is whether the record evidence reasonably supports a finding of guilt beyond a reasonable doubt. Due process of law and the need for the "greater degree of reliability" when the death penalty is imposed demand that a standard at least this stringent be employed in our review of capital sentences. The majority opinion is devoid of any determination that a rational trier of fact could have found the aggravating circumstances beyond a reasonable doubt. Had this Court applied the minimum standard essential to due process it would have concluded that the evidence was insufficient to support the findings of several of the aggravating circumstances listed by the jury.

Third, the majority erred by basing its opinion on the premise that the death penalty must be upheld if the jury correctly found "one or more" aggravating circumstances to exist. Apparently the majority sees the role of this Court in capital sentence review as a limited one of determining if there is at least one correctly found aggravating circumstance. This view is clearly in conflict with the Supreme Court's decisions in *Gregg* and its companion cases, *Jackson v. Virginia*, *supra*, Article 1, § 20 of

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the 1974 Louisiana Constitution, and La.C. Cr.P. art. 905 et seq. Under the principles set forth therein this Court is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion, prejudice or any arbitrary factor; and whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant; as well as whether the evidence reasonably supports each finding that an aggravating circumstance exists beyond a reasonable doubt. *See also, Roberts v. Louisiana*, 428 U.S. 325, 335, 96 S.Ct. 3001, 3007, 49 L.Ed.2d 974, n. 11 (1976).

A sentence of death may be excessive or influenced by passion, error or other arbitrary factor even though each finding of aggravating circumstance is constitutionally supported by the evidence. In such a case this Court is obliged to set the sentence aside and order a new hearing. A sentence of death may be based upon several findings of aggravating circumstances, one or more of which the record evidence does not reasonably support beyond a reasonable doubt. In this event it is our clear duty to order a rehearing with respect to the sentence, unless we can determine beyond a reasonable doubt that the jury would have recommended death independently of its erroneous finding. Since the responsibility of making the affirmative determination that the death penalty is "appropriate" in a given case is assigned exclusively to the jury, *see* La.C.Cr.P. art. 905.6, this Court cannot make such a determination on appeal. Essentially, this Court may only pass on whether the penalty is excessive, supported by the evidence, or influenced by passion, prejudice, error or other arbitrary factor. Therefore, this Court cannot lightly disregard the possibility that a jury recommendation has been influenced by an erroneous finding of an aggravating circumstance or assume that the jury would have made the same recommendation despite the error.

By failing to articulate and apply standards of review which meet the minimum criteria essential to due process and provide the "greater degree of reliability" called for when the death sentence is imposed, the majority of this Court has not only perpetuated injustice in the instant case, it has embarked upon a course which, if not corrected, can only result in the arbitrary and capricious infliction of death penalties which led the United States Supreme Court to invalidate the prior capital punishment statutes in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

ON REHEARING

CALOGERO, Justice.*

Elmo Patrick Sonnier was convicted of two counts of first degree murder. In accordance with the jury's recommendation, the trial court imposed the death penalty for each of the two counts. Upon appeal we affirmed defendant's convictions and sentences. Upon application of the defendant we granted a rehearing to reconsider whether an instruction to the jury during the capital sentencing hearing portion of the bifurcated trial was erroneous or so misleading as to taint the jury's recommendation of the death penalty.

During the sentencing portion of the trial, the state presented no new evidence and the defense called no witnesses. Only the stipulated testimony of Nathan Lubin, a psychologist was introduced by the defense. Within one hour after the jury had retired for deliberation, it presented three questions to the trial judge, the last of which was whether someone sentenced to life imprisonment without benefit of parole, probation or suspension of sentence was eligible for pardon by the governor or for participation in work release programs. Before replying to any of the questions, the trial judge submitted his proposed answers

* Honorable Jesse N. Stone, Jr. served as Associate Justice Ad Hoc in the vacancy created by the resignation of Tate, J.

to both the defense and the state. Neither the defense nor the state voiced any objection to his proposed answers.

The jury was then informed that the governor could exercise his power of pardon irrespective of the sentence imposed upon the defendant. With this instruction, there is no argument. With regard to the defendant's eligibility for work release, the trial judge read R.S. 15:1111(A) and (B).[1] That statute authorizes the Department of Corrections to establish rules governing work release programs which may include placement in "universities, colleges, technical, vocational or trade schools or in sheltered workshops or in training programs designed to improve the skills and abilities of the inmate." The judge further instructed the jury that he did not have a copy of the Department of Corrections' regulations.

There is no contention in this case that the instruction read to the jury was an incorrect statement of the law. The statute was fully and correctly read to the jury. The pertinent question, however, is whether the instruction on work release programs in response to the jury's inquiry was so incomplete as to be misleading.

To the jury's question as to whether a person sentenced to life without benefit of parole, probation or suspension of sentence is *eligible* for participation in a work release, the judge by reading R.S. 15:1111(A) and (B) replied simply that the law authorizes the Louisiana Department of Corrections to establish and administer a work release program for inmates of any institution under its jurisdiction and to establish rules (concededly not then available to the trial judge) for the administration of the program and determination of those inmates who may participate in the program (with the possibility of placement in universities, colleges, technical, vocational or trade schools, etc.). If the judge had reviewed the regulations of the Department of Corrections, the jury would have been informed that any inmate convicted of "murder in any degree, attempted murder, or murder reduced to manslaughter as a result of a plea bargain" was ineligible for participation in work release programs. *See* Department of Corrections Regulation No. 30–14, dated February 9, 1978. The reading of the statute alone, without the Department of Corrections' regulations, left the jurors free to speculate whether the defendant might be returned to society, perhaps almost as soon as he was imprisoned.

Although given an opportunity to read the trial court's proposed response to the inquiry before it was read to the jury, defense counsel offered no objection to the charge. The failure to object to an erroneous charge would under Article 841 waive

1. At the time of defendant's trial R.S. 15:1111, in pertinent part, provided:

"A. The Louisiana Department of Institutions [Department of Corrections, *See* R.S. 15:838] is hereby authorized to establish and administer a work release program for inmates of any institution under the jurisdiction of the department.

"B. The department shall establish rules for the administration of the work release program and shall determine those inmates who may participate in the release program. Notwithstanding any provision of law to the contrary, any convict sentenced to imprisonment at hard labor shall be eligible at any time during his sentence to participate in the work release program, subject to the provisions of this Part. If any inmate violates the conditions prescribed by the Department, his work release privileges may be withdrawn. Failure to report to or return from the planned employment shall be considered an escape under the provisions of R.S. 14:110. The department may approve as work release privileges, placement in universities, colleges, technical, vocational or trade schools or in sheltered workshops or in training programs designed to improve the skills and abilities of the inmate." Acts of 1970, No. 444.

Act 510 of 1978, effective after the trial date, amended this section and others to provide, *inter alia*, that no inmate convicted of first degree murder would be considered for a work release program before the last six months of his sentence. As the termination of a life sentence is not susceptible to calculation, the governor's commutation of the sentence to a term of years would be necessary before work release could become a possibility for someone convicted of murder.

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the error in the ordinary case.[3] And although procedural rules have sometimes been relaxed in capital cases,[3] this Court has never explicitly held that an irregularity or error not preserved by objection at trial may be considered on appeal. We need not here expressly hold that errors in a capital case or a capital sentencing hearing are reviewable notwithstanding a failure to object, for there is an independent basis for this Court's reviewing the entire proceedings in a capital sentence hearing.

The present statutory scheme in Louisiana for imposition of the death penalty was enacted after the United States Supreme Court held in *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) that the Louisiana legislation providing for the death penalty failed to provide a constitutionally adequate response to that Court's decision in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Furman* rejected unbridled jury discretion in the imposition of capital sentences. On the same day that *Roberts* was rendered, the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 approved a Georgia statutory scheme finding that it provided safeguards so that the death penalty could not be imposed in an arbitrary or capricious manner. Apparently in an attempt to enact a constitutionally acceptable statutory scheme for the imposition of the death penalty, the Louisiana legislature modeled our present statutes after those approved in *Gregg*.

One of the safeguards of the Georgia statutes incorporated into our law is the automatic appellate review of every death sentence. So, under Article 905.9 of the Code of Criminal Procedure this Court is required to review every sentence of death for excessiveness. That article also mandates this Court to "establish such procedures as are necessary to satisfy constitutional criteria for review." Pursuant to this authorization, we have adopted Supreme Court Rule 28, § 1 which establishes the following review guidelines:

> "Every sentence of death shall be reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court shall determine:
>
> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

These sentence review guidelines are the same as those authorized by the Georgia statute and approved by the United States Supreme Court in *Gregg*.

By requiring this Court to review every sentence to determine whether it is excess-

2. Article 841 of the Code of Criminal Procedure provides:

> "An irregularity or error cannot be availed of after verdict unless it was objected to at the time of occurrence. A bill of exceptions to rulings or orders is unnecessary. It is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take, or of his objections to the action of the court, and the grounds therefor.
>
> "The requirement of an objection shall not apply to the court's ruling on any written motion."

3. Before its amendment by Act 207 of 1974, Code of Criminal Procedure Article 844 required for an error to be reviewable on appeal that bills of exception be signed by the trial judge prior to the order granting an appeal. Recognizing that a technicality should not deprive a defendant sentenced to death of review of the trial court's proceedings, the legislature amended Article 844 to provide that in death cases the appellate court "to promote the ends of justice" may consider bills that are not timely signed. *See* Official Revision Comments to Article 844.

Additionally this Court in *State v. Jones*, 332 So.2d 466 (La.1976) held that although assignments not briefed or argued are considered abandoned, in a death case, the court nevertheless will review the errors.

sive and mandating that this Court establish guidelines for review that satisfy constitutional criteria, the legislature has provided a system of review to insure against the arbitrary or random imposition of the death penalty.

[47] Under the review guidelines provided by Section 1 of Supreme Court Rule 28, this Court is charged with the responsibility of reviewing the jury's recommendation to determine whether the sentence was influenced by passion, prejudice or any arbitrary factor. The Court must consequently conduct an independent review, regardless of the failure of defense counsel to object to possible error, to determine whether any of these factors contributed to the jury's recommendation of the death penalty.[4]

[48] In the instant case it is clear that the trial court's incomplete response and misleading instruction contributed to the jury's recommendation. The jury was read a statute from which it could infer that the defendant, if sentenced to life imprisonment without benefit of parole, probation or suspension of sentence, *would* be eligible for participation in a work-release program. Shortly after the instruction, the jury returned with the recommendation that defendant be sentenced to death. Had the jury been read the Department of Corrections regulations, it would have known that defendant *would not* have been eligible for the work release program. In that event the jury would have been better able to focus on the defendant, his crime, and the aggravating and mitigating circumstances rather than an erroneous assumption concerning defendant's possible release.

The only evidence presented in the sentencing portion of the trial was the stipulated testimony of Dr. Nathan Lubin, a psychologist. That testimony stressed the automatic sort of aggression upon which the defendant relied as a psychological defense mechanism, concluding that the defendant "is quite capable of irrational and aggressive behavior . . . [and should] be placed in a residential hospital setting in order to avoid the possibility of his aggressive and dangerous behavior." While attempting to establish the mitigating factor of diminished responsibility or capacity, defense counsel through this testimony informed the jury that if defendant were placed in a similar situation, there was a probability that another act of violence or even murder would occur. If the jury had been informed that defendant if sentenced to life imprisonment would remain in prison indefinitely, without eligibility to participate in a work release program, at least under the current regulations of the Department of Corrections, Dr. Lubin's testimony might have had a positive effect upon the jury. However, if the jury thought that defendant might be placed in a work release program, that very same testimony could only have been to defendant's detriment.

The jurors' concern that defendant might be returned to society was evident in their request for instruction on the governor's power to pardon and defendant's possibility of participating in a work release program. The fear that defendant might return to society through work-release which was induced by the trial court's incomplete response and misleading instruction is in our view an "arbitrary factor" contributing to

4. In *Prevatte v. State*, 233 Ga. 929, 214 S.E.2d 365 (1975) the Georgia Supreme Court relying on the death penalty review procedure later approved in *Gregg v. Georgia*, *supra*, and subsequently adopted by the Louisiana legislature, vacated a jury's recommendation of the death sentence when it found that an unobjected to argument by a district attorney may have influenced the jury to impose a more severe sentence than unbiased judgment would have given. That court relied upon the mandate of the death penalty procedure requiring the court to determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor" to review the error despite defense counsel's failure to object.

Digest

jury's recommendation of the death penalty.[5]

Article 905.1(B) of the Code of Criminal Procedure provides that if this Court finds an error in the sentencing hearing which necessitates a remand and a new trial, the trial court shall be empowered to empanel a new jury for the determination of the issue of penalty.[6] Because we have found no error in the guilt determination portion of defendant's trial, defendant's conviction will be affirmed. However, because we have found that the defendant's death sentence was imposed under the influence of an arbitrary factor, the sentence must be vacated and the case remanded to the district court for the empanelling of a new jury for determining only the issue of penalty in accordance with Article 905.1.

Decree

Accordingly, the opinion of this Court on original hearing is reinstated insofar as it affirmed defendant's conviction; but defendant's sentence is vacated and the case remanded to the district court for the empanelling of a new jury for determining anew only the issue of penalty in accordance with the procedure set out in Article 905.1(B).

CONVICTION AFFIRMED; SENTENCE VACATED; REMANDED FOR NEW TRIAL ON PENALTY ISSUE ONLY.

SUMMERS, C. J., dissents.

MARCUS, J., concurs in part and dissents in part and assigns reasons.

BLANCHE, J., dissents and assigns reasons.

MARCUS, Justice (concurring in part and dissenting in part).

As the majority correctly states: "There is no contention in this case that the instruction read to the jury was an incorrect statement of law." In my view, to have required the trial judge to extend his instruction to include the regulations of the Department of Corrections is beyond that which is required by law. Accordingly, I would affirm the conviction and sentence and reinstate this court's opinion on original hearing. Hence, I respectfully concur in part and dissent in part.

BLANCHE, Justice (dissenting).

The majority opinion holds that had the jurors been aware of the Department of Corrections' rules and regulations prohibiting work release of prisoners convicted of first degree murder, they would not have been free to speculate whether defendant might be returned to society, perhaps almost as soon as he was imprisoned. Of course, the same speculation was not indulged in concerning the Governor's authority to pardon, although he too could have released the defendant almost as soon as he was imprisoned.

The jury was exhaustively and properly instructed at the sentencing hearing and were they to engage in such speculation, it would amount to a violation of their oaths.

I respectfully dissent.

5. We so conclude without regard to defendant's contention that at least one juror was holding out for a sentence of life imprisonment until he learned that defendant would be entitled to work release, evidence of which defendant was unable to present because of the rule prohibiting jurors from impeaching their own verdicts. R.S. 15:470.

6. Article 905.1(B) provides:

"If an error occurs only during the sentencing hearing which would necessitate the declaration of a mistrial, or the granting of a new trial by the trial court, or if an appellate court finds an error that occurred only in the sentencing hearing which would necessitate a remand and a new trial, then the trial court shall be empowered to empanel a new jury under the same procedure set out in Title XXVI, Chapter 3 of the Louisiana Code of Criminal Procedure for determining only the issue of penalty, and the rule of sequestration shall apply to the new jury so empanelled."

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JUN 2 2 1981

SUPREME COURT OF LOUISIANA

NO. 80-K-1846

STATE OF LOUISIANA

VERSUS

ELMO PATRICK SONNIER

APPEAL FROM THE SIXTEENTH JUDICIAL DISTRICT COURT,
PARISH OF ST. MARY,
HONORABLE C. THOMAS BIENVENU, JR., JUDGE.

DENNIS, Justice.

This is Elmo Patrick Sonnier's second appeal from sentences of death for slaying two youths parked on a country road. In his first appeal this court affirmed his first degree murder convictions, reversed his death sentence because of a procedural error which occurred during the penalty hearing, and remanded the case for a new sentence proceeding. State v. Sonnier, 379 So.2d 1336 (La. 1980). The district court conducted such a hearing and again sentenced Sonnier to death in accordance with the jury's recommendation. In this appeal Sonnier argues that his death sentences are based on both procedural and substantive errors. He also seeks to attack his convictions and obtain a new trial on the question of guilt or innocence

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Blanche J. Caruso with reasons
Lemmon, J. to 41a

despite the finality of this court's decree on these issues.

Ultimately, we conclude that defendant's sentence of death must be affirmed. A new sentencing proceeding was conducted eliminating the error which caused reversal of the original sentence. Defendant's appeal raises no new issues which warrant a second nullification.

In assessing the extent of Elmo Patrick Sonnier's culpability in the first degree murders, the jury in the sentence proceeding now under review had to sift through several versions of the facts accumulated in numerous inculpatory statements and three trials. When Elmo Patrick Sonnier and his brother, Eddie James Sonnier, were first apprehended they each gave a confession laying the blame primarily on Elmo, the older brother and the only one with a felony crime record. The state first prosecuted Elmo Patrick Sonnier and obtained convictions of first degree murder and death sentences, based primarily on Sonnier's confessions and his brother's testimony, which, contrary to Elmo Patrick Sonnier's trial testimony, depicted Elmo as the instigator and the victims' actual executioner. The state next prosecuted the younger brother, Eddie James Sonnier and was again successful in obtaining convictions and death penalties. However, both brothers' death penalties were reversed on appeal: Elmo Patrick Sonnier's because of a procedural error, which required that his case be remanded for a new sentencing proceeding. 379 So.2d at 1368-72; Eddie James Sonnier's because the death penalty was excessive in view of his subsidiary role in the crimes, requiring reduction of his sentences to life imprisonment without parole State v. Sonnier, 380 So.2d 1 (La. 1979). At Elmo's second penalty hearing, on remand, his brother Eddie, no longer exposed to the death penalty, dramatically changed his story

to coincide with Elmo's testimony. Eddie recanted his previous testimony and claimed that he, instead of Elmo, pulled the trigger of the murder weapon and played the dominant role throughout the criminal episode. The prosecution, however, effectively used the brothers' confessions and Eddie's previous trial testimony to challenge their credibility. Consequently, the jury's threshold question was whether Elmo Patrick Sonnier was the principal malefactor or a compliant follower in the course of criminal conduct.

The jury's apparent conclusion that Elmo Patrick Sonnier was primarily responsible for the murders and should be sentenced to death is warranted by the record. From the evidence the jury could have found beyond a reasonable doubt that Elmo played the predominant role in the actual killings and most of the aggravating circumstances. Specifically, the evidence adequately supports the following factual findings.

On the evening of November 4, 1977 Elmo Patrick Sonnier and his younger brother, Eddie James Sonnier, left St. Martinville in Elmo's car to go rabbit hunting. With them they carried two .22 caliber rifles, two sheriff or security guard badges and a set of handcuffs. After spending a considerable time riding around, Elmo suggested they look for lovers in parked automobiles. They soon came across an automobile parked in a remote part of St. Martin Parish at about 1:00 a.m. Elmo Patrick Sonnier approached the car and displayed his badge to the young occupants, David LeBlanc and Loretta Bourque. Posing as a police officer, Elmo told David and Loretta that he was taking them to the landowner who would determine whether to press charges against them for trespassing.

Elmo ordered them from the automobile, confiscated their licenses and handcuffed them. However, because Elmo's car had a flat tire, the youths were placed in the back seat of their own vehicle. Elmo told his brother to drive, but Eddie refused. Elmo took the wheel and drove the automobile with his three passengers twenty-one miles over rural roads he had learned as a local cab driver to a remote oil field in Iberia Parish. David and Loretta were removed from the car, and the young man was handcuffed to a tree. After telling Eddie he was going to "scare" them, Elmo led Loretta into the woods, leaving David with his brother.

Growing impatient for his brother's return, Eddie James Sonnier followed him into the forest. Upon discovering that Elmo had forced Miss Bourque to have sexual intercourse, Eddie talked to her and she submitted to him also in return for the couple's safe release. After the second rape, Bourque and LeBlanc were brought back toward the car. But Elmo told his brother the victims could not be released because they now had information which could send him back to prison. David and Loretta were forced to lie on the ground side by side. Elmo Patrick Sonnier fired six .22 caliber rifle shots alternately into the heads of the youths while his brother held a flashlight. The first two shots were sufficient to kill them instantaneously.

The brothers left the bodies and drove LeBlanc's car back to the scene of the abduction. After changing Elmo's flat tire they kept a jack taken from the LeBlanc vehicle. The next day the brothers divided some money taken from the young couple and buried the rifles in another remote area.

Many of the facts of this narrative casting Elmo Patrick Sonnier in the dominant role were controverted by the testimony of both brothers at his second penalty hearing.

Nevertheless, the jury was justified in rejecting their testimony at this hearing because of the brothers' confessions, Eddie James Sonnier's previous trial testimony and other weaknesses and inconsistencies in the brothers' testimony.

Defendant has filed seven assignments of error. Although some of these overlap with arguments on capital sentence review and others are not properly raised at this stage of the proceedings, we will consider them all. Furthermore, in this capital case, we will notice and pass judgment on any other error which appears in the record.

Assignment of Error Affecting the Determination of Guilt

Assignment of Error Number 2

In assignment number two the defendant argues that it was error for the trial court to deny his motion for a new trial on the question of guilt based on Eddie James Sonnier's testimony that he, not Elmo, actually killed the victims and played the dominant role in each aggravating circumstance found by the jury. Pretermitting whether the motion was timely, we find no merit in the assignment.

A trial judge must grant a new trial whenever new and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty. La. C.Cr. P. art. 851. In the present case the trial judge reasonably could have concluded that Eddie's recantation would not have created a reasonable doubt of guilt in the mind of any reasonable juror.

If the recantation could have been introduced in evidence at trial along with Eddie's testimony casting most of the blame on his brother, it, of course, would have had some effect. However, in fairly assessing the effect, we must also hypothesize that the jury would have been aware that Eddie changed his story after being relieved of fear of the death penalty and that he had an opportunity to confer with Elmo about his testimony. Also, the jury had before it, not only Eddie's original testimony, but the confessions of both Eddie and Elmo which placed the smoking gun in Elmo's hands. Furthermore, Eddie's recantation did not totally exculpate Elmo from complicity in the crime of first degree murder. It confirmed that he was a willing participant in the events leading up to and following the actual killings. In view of the other evidence pointing to Elmo as the real instigator and executioner, we agree that Eddie's recantation probably would not have changed the verdict of guilty of first degree murder if it had been introduced.

Assignments of Procedural Error Affecting Sentence

Assignment of Error Number 4

In assignment number four defendant argues that the trial court erred by failing to exclude all witnesses from the courtroom during closing arguments. He contends that the presence during closing arguments of a father of one victim and the police officer witnesses unduly influenced the jury to impose the death penalty.

The court may order that the witnesses be excluded from the courtroom or from where they can see or hear the proceedings and refrain from discussing the facts of the case or the testimony of any witness with any one other than

the district attorney or defense counsel; the court may modify its order in the interest of justice. La. C.Cr.P. art. 764. The purpose of this article is to insure that a witness will testify as to his own knowledge of the case without being influenced by testimony of other witnesses and to strengthen the role of cross-examination in developing the facts. State v. Walton, 360 So.2d 166 (La. 1978); State v. McDaniel, 340 So.2d 242 (La. 1976).

In this case, the purpose of sequestration of the witnesses was fulfilled, since they had completed their testimony when they were allowed to listen to closing arguments. The statutory rule permits the court to terminate or modify sequestration after a witness' testimony can no longer be influenced or in the interest of justice. La. C.Cr.P. art. 764. Nevertheless, in the event of actual prejudice to a defendant in a capital case, the trial court's failure to exclude a witness would constitute error. However, in the present case there was no showing of actual prejudice or extraordinary circumstances from which we may infer that prejudice occurred. Cf. State v. Prejean, 379 So.2d 240 (La. 1980).

Assignment of Error Number 5

In assignment number five defendant complains of the trial court's refusal to give the following special written charge: "I charge you that in your deliberations on punishment, you are not to return a sentence of death if you determine that the defendant, Elmo Patrick Sonnier, was not the responsible party who pulled the trigger on the weapon which killed the victims."

A requested special charge must be given by the court if it does not require qualification, limitation, or explanation, and if it is wholly correct and pertinent.

La. C.Cr.P. art. 807. In this case the requested charge was not wholly correct and did require qualification, limitation and explanation.

One who aids and abets in the commission of a first degree murder may be charged and convicted of the crime as a principal, provided that he specifically intended to kill or to inflict great bodily harm on the victim. State v. Holmes, 388 So.2d 722 (La. 1980); cf. State v. McAllister, 366 So.2d 1340 (La. 1978). The capital punishment scheme by which this case is governed calls for the sentencing hearing to focus on the circumstances of the offense and the character and propensities of the offender. La. R.S. 14:30 (1950), as amended by 1976 Acts, No. 657, § 1; La. C.Cr.P. arts. 905 et seq., as enacted by 1976 Acts, No. 694, § 1. In a proceeding to determine penalty, however, the jury is not required to recommend a sentence of life imprisonment merely because the defendant did not himself directly commit the act constituting the first degree murder. Instead, the jury should weigh the fact that the murder weapon was employed directly by the defendant's accomplice, rather than the defendant, as a mitigating circumstance in determining the appropriate penalty. La. C.Cr.P. art. 905.5(g)

Several members of the United States Supreme Court are of the view that it violates the Eighth Amendment to impose the death penalty without a finding that the defendant possessed a purpose to cause the death of the victim. See Lockett v. Ohio, 438 U.S. 586, 619 (Marshall, J., concurring), 621 (White, J., concurring and dissenting). Furthermore, it is clearly unconstitutional to impose the death penalty in such a case without permitting the jury to consider as a mitigating circumstance the fact that the defendant did not personally commit the murder. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954,

57 L.Ed.2d 973 (1978). However, Louisiana's capital punishment regime is not vulnerable to attack on either score. A finding that an accomplice specifically intended to kill or to inflict great bodily harm is necessary before he can be convicted of first degree murder. State v. Holmes, supra. The sentencing proceeding jury may consider as a mitigating circumstance that the offender was a principal whose participation was relatively minor, and any other relevant mitigating circumstance. La. C.Cr.P. art. 905.5(g), (h).

Assignment of Error Number 6

In assignment number six defendant contends reversible error occurred when the court refused to give another special requested charge:

> "Ladies and Gentlemen of the jury, I charge you that in your determination of punishment, you must make a determination that any aggravating circumstance has been proven to exist by competent evidence beyond a reasonable doubt. Further, in determining whether any mitigating circumstance has been proven to exist you must determine that such does exist unless such is disproved by the State of Louisiana by proof beyond a reasonable doubt. Thus, if the State of Louisiana fails in its proof of any aggravating circumstance, you are to return a sentence of life imprisonment. Further, if the State of Louisiana fails to disprove that any mitigating circumstance exists, then you are to return a sentence of life imprisonment."

The defendant's special requested charge is based on a misunderstanding of the capital sentence proceeding. After a verdict of guilty to first degree murder, a sentencing hearing is conducted. La. C.Cr.P. arts. 905 et seq. The sentence will be life imprisonment unless the jury finds unanimously and beyond a reasonable doubt at least one statutorily defined "aggravating circumstance." La. C.Cr.P. art. 905.3. Having found an aggravating circumstance, however,

the jury is not required to impose the death penalty. Instead, it is merely authorized to impose it after considering evidence of any mitigating circumstances. La. C.Cr. P. art. 905.3. Unless the jury determines unanimously that the death penalty should be imposed, the defendant will be sentenced to life imprisonment without parole, probation or suspension of sentence. In the event the jury imposes the death penalty, it must designate in writing the aggravating circumstance which it found to exist beyond a reasonable doubt. La. C. Cr.P. art. 905.7. See State v. Payton, 361 So.2d 866 (La. 1978).

The capital sentencing procedure does not establish any presumptions or burdens of proof with respect to mitigating circumstances. The jury is required to consider evidence of any mitigating circumstances, and to weigh it against any aggravating circumstance which it has unanimously found beyond a reasonable doubt, before recommending the more appropriate penalty, either a penalty of life imprisonment without parole or a sentence of death. Accordingly, the defendant's special requested charge is incorrect in the several instances in which it is inconsistent with this procedure.

Assignment of Substantive Errors Affecting the Sentence

Assignments of Error Numbers 1, 3 and 7

In assignments numbers one, three and seven defendant expounds a mixture of arguments. He contends that he has been denied equal protection of the laws by having been selected as the only one to receive the death penalty of two accomplices convicted of the same crime. Moreover, he argues the evidence does not warrant a finding that his culpability was so much greater than his brother's as to

justify the death penalty.

The statutes under which defendant's death sentence was imposed were based on those approved by the United States Supreme Court as providing adequate standards to guide the jury in selecting those among first degree murderers who should receive the death penalty. Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); State v. Payton, 361 So.2d 866 (La. 1978). There is nothing in the rationale of the high court's decision which would indicate that the same selection process could not be used to decide who, if anyone, among persons involved in the same first degree murder, should be chosen to suffer capital punishment.

For reasons previously given in this opinion, we conclude that the evidence adequately supports findings that defendant initiated a course of criminal conduct which culminated in his direct commission of two first degree murders, that he played the predominant role in each of the aggravating circumstances found by the jury, and a finding that the death sentence is the appropriate penalty in his case.

CAPITAL SENTENCE REVIEW

Every sentence of death is reviewed by this court to determine if it is excessive. In determining whether the sentence is excessive the court determines whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Louisiana Supreme Court Rule 28 § 1.

A. Aggravating Circumstances

In recommending the death penalty, the jury found

and listed five aggravating circumstances. La. C.Cr.P. arts. 905.4, 905.7. We have reviewed the record with respect to each aggravating circumstance and conclude that the evidence is sufficient to support a reasonable jury's finding beyond a easonable doubt of four of the five aggravating circumstances.

The jury found that the offender was engaged in the perpetration of aggravated kidnapping. La. C.Cr.P. art. 905.4(a). Aggravated kidnapping includes the forcible seizing and carrying of a person from one place to another with the intent to force the victim to give up anything of apparent value, or to grant an advantage or immunity to secure his or her release. La. R.S. 14:44. Sexual gratification constitutes something of apparent value for purposes of the statute. State v. Eddie Sonnier, 380 So.2d 1 (La. 1980); State v. Dupre, 369 So.2d 1303 (La. 1979). The record supports a finding beyond a reasonable doubt that Elmo Patrick Sonnier seized and carried the couple from one place to another with the intention of forcing the female victim to have sexual intercourse with him.

The jury found that the offender was engaged in the perpetration of aggravated burglary and armed robbery. La. C.Cr.P. art. 905.4(a). Aggravated burglary includes the unauthorized entering of a movable where a person is present, with the intent to commit a felony or theft therein, when the offender is armed with a dangerous weapon. La. R.S. 14:60. Armed robbery is the theft of anything of value from the person or immediate control of another by use of force or intimidation, while armed with a dangerous weapon. La. R.S. 14:64. Evidence was introduced that Elmo Patrick Sonnier was armed with a dangerous weapon when he entered the automobile in which the victims were parked, that he intended to commit kidnapping and theft, and that he and Eddie committed armed robbery by taking money, wallets and drivers' licenses from

the victims.

The jury found that the offender knowingly created a risk of death or great bodily harm to more than one person. La. C.Cr.P. art. 905.4(d). A majority of this court has held that this aggravating circumstance is established when the defendant by a single and consecutive course of conduct contemplates and causes a great risk to more than one person. State v. Monroe, _____So.2d_____ (La. 1981), No. 80-KA-2137; State v. Culberth, 390 So.2d 847 (La. 1980). In this case the execution of two victims lying side by side with six rapid rifle shots clearly amounts to a single consecutive course of conduct by which defendant contemplated a great risk to more than one person.

The jury found that each offense of first degree murder was committed in an especially heinous, atrocious or cruel manner. La. C.Cr.P. art. 905.4(g). This court has held that in order for the jury to conclude that the offense was committed under this aggravating circumstance there must exist evidence, from which the jury could find beyond a reasonable doubt, that there was torture or the pitiless infliction of unnecessary pain on the victim.[1] State v. Monroe, ____So.2d ____ (La. 1981), No. 80-KA-2137; State v. English, 367 So.2d 815, 823 (La. 1979).

The United States Supreme Court's decision in

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[1] On one occasion, in Elmo Patrick Sonnier's first appeal, in the original opinion of this court, a majority subscribed to the notion that the "torture or pitiless infliction of pain" could be either "physical or psychological." State v. Sonnier, 379 So.2d 1336, 13 (La. 1980). In retrospect, this appears to be such a broad and vague addition to our construction of the aggravating circumstance as to violate the Eighth and Fourteenth Amendments. See Godfrey v. Georgia, _____U.S._____ 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Godfrey v. Georgia, _____U.S.____, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) contains lessons pertinent to the application of Louisiana's "especially heinous manner" aggravating circumstance. In that case, the high court reversed death sentences based on convictions of two counts of murder and a Georgia jury's finding that the aggravating circumstance as to each conviction was that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." The evidence at trial showed that the defendant went to a trailer where his wife, mother-in-law and daughter were located, shot his wife in the head with a shotgun through a window, killing her instantly, and then proceeded into the trailer, where after striking and injuring his fleeing daughter with the barrel of the gun he shot his mother-in-law in the head also killing her instantly. The trial court, in instructing the jury on the aggravating circumstance, merely quoted the bare statutory language. The Georgia Supreme Court, in affirming the sentences, held that the evidence supported the jury's finding of the statutory aggravating circumstance and simply asserted that the verdict was "factually substantiated."

Although unable to agree on an opinion, six members of the United States Supreme Court agreed that the Georgia Supreme Court had erred in violation of the Eighth and Fourteenth Amendments in affirming the death sentences. Because of the lack of a majority opinion and the complexity of the plurality opinion, the scope of the court's decision is uncertain. The court held clearly that a death sentence cannot be upheld on the ground that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved . . . depravity of mind" without a narrowing

construction of "depravity of mind" by the state supreme court providing rational criteria for distinguishing a case in which the death penalty is to be imposed from the many cases in which it is not. 100 S.Ct. at 1767, 64 L.Ed.2d at 409. Additionally, the various opinions of the justices expound two other recommendations or nascent rules of law: (a) a death sentence may be upheld on the ground that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture" if "torture" is construed so as to require evidence of serious physical abuse of the victim before death, 100 S.Ct. at 1766 (plurality opinion of Stewart, J.) and (b) it is not enough for a reviewing court to apply a narrowing construction to ambiguous terms such as "depravity of mind" or "torture;" the jury must be instructed on the proper, narrow construction of the statute. 100 S.Ct. at 1765 (plurality opinion of Stewart, J.); 100 S.Ct. at 1769 (Marshall, J., concurring).

Because of the similarity of thought and language in the Georgia and Louisiana statutory definitions of "especially heinous" and "outrageously vile" aggravating circumstances, some of the teachings of Godfrey are directly applicable to the Louisiana capital punishment regime: This court should continue to apply the narrowing construction it has employed in previous cases, viz., in order for the jury to find that the offense was committed in an especially heinous, atrocious or cruel manner there must exist evidence, from which the jury could find beyond a reasonable doubt, that there was torture or the pitiless infliction of unnecessary pain on the victim. This construction should be clarified to include an explanation that "torture" requires evidence of serious physical abuse of the victim before death. Finally, since the United States Supreme Court has made it

clear that the sentencer's discretion must be channelled and guided by clear, objective and specific standards, this court should require that juries considering whether to impose the death penalty on the basis of this aggravating circumstance must be instructed on the proper, narrow construction of the statute.

In the present case the jury's findings that the homicides were committed in an especially heinous, atrocious or cruel manner were of questionable constitutional validity. The jury was not instructed on the proper, narrow construction of the statute. There was no evidence that the male victim was subjected to any serious physical abuse, and the evidence may not be constitutionally sufficient to support a finding that the female was a victim of torture or the pitiless infliction of unnecessary pain.

However, the evidence was clearly sufficient to support the jury's findings of four out of the five aggravating circumstances it listed. A majority of this court has held that it knows of no constitutional requirement that a death sentence be vacated whenever the jury errs in only one of its findings of several statutory aggravating circumstances.[2] State v. Monroe, ___So.2d___ (La. 1981), No. 80-KA-2137. Accordingly, the failure of one aggravating circumstance in this case does not so taint the proceedings as to invalidate the other aggravating circumstances found or the sentence of death.

---

[2] On several occasions, I have dissented from this opinion. See State v. Monroe, ___So.2d___ (La. 1981), No. 80-KA-2137; State v. Williams, 383 So.2d 369, 375 (La. 1980); State v. Bonnier, 379 So.2d 1336, 1364 (La. 1980); State v. Martin, 376 So.2d 300, 314 (La. 1979). However, my view has failed to garner any other vote on this court. Acknowledging the futility of continual dissents on this issue, I reluctantly join the majority position until such time as its error is recognized by other members of this court or the United States Supreme Court.

B. Proportionality of Sentence

Upon reviewing Elmo Patrick Sonnier's first appeal, the original opinion of this court set forth in detail his significant characteristics and propensities, as reflected by the record:

> "Elmo Patrick Sonnier is a white male, age twenty-eight years (twenty-six at the time of the offense). He attended school through the seventh grade at which time he quit and went to work in the oil fields. The Wechsler Adult Intelligence Scale Test conducted on January 31, 1978, indicated a verbal I.Q. score of dull-normal range (84), a performance I.Q. score in the average range (98) and a full scale I.Q. in the average range (90). No neurological impairment was noted by the Bender-Gestalt Test. The Rorschach Examination indicated the defendant had contact with reality and there were indications of a potential for above average creativity and intelligence.
>
> "Sonnier's criminal record reveals five arrests as a juvenile: disturbance (no disposition); simple burglary and simple criminal damage (indefinite period of supervised probation); simple burglary (continued probation until April 24, 1967); fight (released); juvenile trouble (released). His adult record includes an attempted theft of a boat for which he was released. He was convicted on two counts of auto theft in 1968 and sentenced to four and three years at hard labor. (The sentences ran concurrently.) He was paroled in 1970. On July 7, 1970, he was arrested on a charge of theft by false pretenses but the case was dismissed. In November of 1970, he was arrested and charged with the theft of a shotgun and a television which resulted in his parole being revoked. During the period he was on parole, he was in trouble for non-support, and changing jobs and residences. Defendant served out his term at Angola and was discharged on March 10, 1972.
>
> "Defendant worked in the oil fields until 1975, except for the period he was at Angola. He worked on a hog farm in Texas for one year and returned to Louisiana in 1976. He was then employed by Hub Security until September of 1976 when he was fired because he had falsified his application for employment and his employer suspected he had stolen some money from a client. The defendant then took a job with B & B Security Police until March of 1977 when he began working for Jo-Dee Equipment Rental where he was employed at the

time of his arrest. He was regarded by Jo-Dee as a reliable employee." 379 So.2d 1362-63.

The record before us today does not reveal any relevant new evidence of the defendant's character or propensities.

On defendant's first appeal this court compared his case extensively with two other first degree murder cases in the district in which sentence was imposed after January 1, 1976: (1) James Lee Bullock; (2) Frank Bennett. State v. Sonnier, 379 So.2d at 1363. Since his first appeal there have been two additional first degree murder cases in the district in which sentence was imposed.

Marcel Knott was tried in St. Mary Parish after a change of venue from St. Martin Parish was ordered. The case grew out of a feud between two families, the Knotts and the Hayes, who had been close friends at one time but who had been divided by an inter-family dispute. One evening Knott and his wife were in Henderson where they backed into a parked car. Officers Hayes and Courville investigated the accident and were subjected to such verbal abuse by Mrs. Knott that Officer Hayes forced her into the patrol car. Knott then began shooting at the officers, killing Courville but only wounding Hayes. He was convicted of second degree murder and was sentenced to life imprisonment. For a comparison of the Knott case with Eddie James Sonnier's case see State v. Sonnier, 380 So.2d 1, 7-9 (La. 1980).

David Liner was convicted of first degree murder but the jury sentenced him to life imprisonment. Liner was convicted of murdering his neighbor by repeatedly stabbing her with forks and butter knives until she bled to death. The attack was precipitated by the victim's rejection of Liner's sexual advances which followed an argument that Liner had with his wife earlier the same evening. At the trial there was

expert testimony to the effect that Liner had been psychotic, a schizophrenic and paranoid type, for at least ten years. In addition one expert testified that the defendant did not know the difference between right and wrong with respect to the offense. In addition at the sentencing phase of the trial the father of the victim who had known Liner all his life took the stand and asked that the jury spare his life. See State v. Liner, ____So.2d____ (La. 1981), No. 80-KA-2109.

The other first degree murder trials in the district were a result of the murders in this case. Eddie James Sonnier was convicted of first degree murder and sentenced to death, but we reversed his conviction because our review of the record in his case indicated that the jury's recommendation of death did not conform to the sentences meted out in the other first degree murder cases because the defendant's intent to kill was not clearly shown in Eddie's case, because the jury apparently ignored several mitigating factors and because we concluded that the evidence indicated that Eddie played a relatively minor role in the creation of the aggravating circumstances found by the jury. 380 So.2d at 8-9. Elmo Patrick Sonnier's first penalty proceeding, of course, also resulted in a death sentence which we reversed because of an erroneous and misleading jury instruction. 379 So.2d at 1369-72.

The homicides in Bullock, Bennett, and Knott all occurred after there was an altercation or confrontation between the victims and the defendants. These cases thus differed from the instant case in at least this respect. It is true that the victims in Bullock and Liner suffered more painful deaths, but in this case there was evidence of rape and kidnapping not present in any of the other murders. In both Bennett and Liner there was significant evidence questioning defendant's sanity or mental stability. There was no

evidence that Elmo Patrick Sonnier had a mental disease or incapacity. Although the murder in Liner was as shocking and senseless, Liner's questionable mental stability and the plea by the victim's father in that case explains the jury's decision to spare his life. The death penalty in the present case, therefore, does not appear arbitrary, capricious or disproportionate to the results reached in other first degree murder trials in the district.

C. Passion, Prejudice or Arbitrariness

The death sentence in this case involved no issue of racial prejudice. Both the victims and the perpetrators were white. Nor did local passion play a role in this sentencing hearing, for venue for the sentencing hearing was changed from New Iberia, the site of the crime and first trial, to St. Mary Parish. Our review of the record does not indicate that the death penalty was imposed arbitrarily or without reason.

Conclusion

The defendant's convictions and sentences of death are affirmed.

AFFIRMED.

* * *

SUPREME COURT OF LOUISIANA

NO. 89-K-1846

STATE OF LOUISIANA

V.

ELMO PATRICK SONNIER

MARCUS, Justice (concurring)

I agree that defendant's convictions and sentences should be affirmed; however, I consider that the murders were committed in an "especially heinous, atrocious or cruel manner." Accordingly, I respectfully concur.

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

VERSUS NO. 80-K-1846

ELMO PATRICK SONNIER

BLANCHE, Justice (concurring)

I concur in the very excellent sentence review, but dissent from the opinion's holding that the crime was not committed in an especially heinous, atrocious or cruel manner. I do agree that although all murders are heinous and atrocious, any system that seeks to distinguish rationally among murders in terms of heinousness must necessarily incorporate into that concept some idea of torture, or the pitiless infliction of unnecessary pain on the victim. I would not, however, limit the infliction of pain to physical pain, as mental pain may be as much or more devastating in its nature and scope.

The young female victim in this case was piteously raped by the defendant and gave in to his brother in order to secure the safe release of herself and her boyfriend. Thereafter, she and her boyfriend were turned face down on the ground and executed, the first shot missing its mark.

In my view, rape is an infliction of unnecessary pain on the victim, and amounts to both mental as well as physical torture. See this writer's original opinion in this case at 379 So.2d 1336 (La. 1980).

* * *

Supreme Court of Louisiana

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE NEWS RELEASE #87

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 4th day of September, 1981, the following action was taken by the Supreme Court of Louisiana, composed of Chief Justice John A. Dixon, Jr. and Associate Justices Pascal F. Calogero, Jr., Walter F. Marcus, Jr., James L. Dennis, Fred A. Blanche, Jr., Jack Crozier Watson, and Harry T. Lemmon, in the cases listed below:

REHEARINGS GRANTED:

80-KA-2446 State v. Richard G. Naas

80-KA-2720 State v. Gremel Harris

80-KA-2414 State v. James L. Humphrey

REHEARINGS DENIED:

80-KA-2349 State v. Glenn A. Mack
MARCUS, J., BLANCHE, J. and WATSON, J. would grant.

81-C-0204 Ernest Morgan, et al v. Hartford Accident and Indemnity Co., et al

80-KA-2677 State v. Larry D. Petterway
DENNIS, J. would grant.

80-KA-2779 State v. Darrell Miles
DENNIS, J. would grant.

80-KA-1846 State v. Elmo P. Sonnier

80-K-2051 State v. William F. Ross
CALOGERO, J. and WATSON, J. would grant.
LEMMON, J. concurs in denial with reasons.

81-O-0851 In Re: J. A. "Bob" Wilkes, Justice of the Peace
CALOGERO, J., MARCUS, J., and LEMMON, J. would grant.

80-K-2375 State v. Randolph Warren a/k/a Randolph Mason
CALOGERO, J. and DENNIS, J. would grant.

80-KA-2782 State v. Timothy C. Darby
CALOGERO, J. concurs in the denial with reasons.
DENNIS, J. would grant.

80-C-1794 Florestine Jenkins, et al v. Jefferson Parish Sheriff's Office
MARCUS, J., BLANCHE, J. and WATSON, J. would grant.

80-KA-2864 State v. James M. Hebert
LEMMON, J. would grant.

80-KA-2781 State v. Robert Brown

80-KA-2155 State v. Alfred Williams

81-K-0712 State in the Interest of Kenneth Banks
DENNIS, J. would grant.

80-KA-2493 State v. Billy Woods
DIXON, C.J. and DENNIS, J. would grant.

80-KA-2687 State v. William C. Clark
DIXON, C.J. and CALOGERO, J. would grant.

PERMISSION TO SEARCH

I, HELEN GRACE SONNIER, have been informed by
MAJ. O'NEIL TYLER and DET. LT. STEVE DAVIS
that I made proper identification as (an) authorized law enforcement officer(s) of the
IBERIA PARISH SHERIFF'S DEPARTMENT
of my CONSTITUTIONAL RIGHT not to have a search made of the premises and property owned by me and/or under my care, custody and control, without a search warrant.

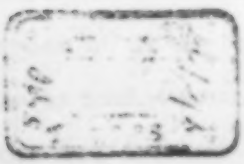
Knowing of my lawful right to refuse to consent to such a search, I willingly give my permission to the above named officer(s) to conduct a complete search of the premises and property, including all buildings and vehicles, both inside and outside of the property located at ST. RT. 6 BOX 246 (JEFFERSON ISLAND RD.)
NEW IBERIA, LA.

The above said officer(s) further have my permission to take from my premises and property, any letters, papers, materials or any other property or things which they desire as evidence for criminal prosecution in the case or cases under investigation.

This written permission to search without a search warrant is given by me to the above officer(s) voluntarily and without any threats or promises of any kind, at 6:32 P.M. on this 1 day of DECEMBER 1977, at NEW IBERIA, LA.

Signed Helen Sonnier

Witness: M. Steven L. Davis — Witness: Major O'Neil G. Tyler
Address 310 Wayne St. N.I. — Address P. O. Box 9440 N. I.
Phone (H) 367-7511 (B) 369-3711 — Phone (H) 9-3711 (B) 5-6170



STATE OF LOUISIANA

PARISH OF IBERIA

SEARCH WARRANT

To: CHIEF DEPUTY JAMES T. DESORMEAUX or any Louisiana Peace Officer.

An affidavit having been made before me upon the oath of CHIEF DEPUTY JAMES T. DESORMEAUX in support of a request for this search warrant, the Court finds hereby that the affiant(s) (is) (a) credible person(s) and that the facts recited in the affidavit establish to the Court's satisfaction that there is probable cause to search the residence and surrounding premises of Elmo Patrick Sonnier, located on the Jefferson Island Road, Star Route B further described as the first house on the left side of Louisiana 675 just before the first railroad track when heading southwest. It is a white house, and is occupied by Gladys Horton, Helen Sonnier, Eddie Joseph Sonnier, and Elmo Patrick Sonnier

During said search you are hereby authorized to seize the following described property: handcuffs, driver's licenses belonging to victims named below, firearms, clothing, footwear, ammunition, early 1960's blue Dodge Dart automobile belonging to Elmo Patrick Sonnier

"The lawful purpose or reason for the search is that the above-described article(s) (delete inapplicable reasons)

c. May constitute evidence tending to prove the commission of an offense.

e. Other: _____

YOU ARE HEREBY ORDERED to search the aforesaid residence of Elmo Patrick Sonnier, located on the Jefferson Island Road, New Iberia, Louisiana at anytime of the day or night, including Sunday and holidays, (Delete reference to nighttime, Sunday or holiday search if not applicable), and if the item(s) specified are found there, to seize them and hold them in safe custody pending further orders of the court. This shall be your warrant, whereof you are to make due return according to law.

WITNESS my official signature on this 1st day of December, 19 77, at New Iberia, Louisiana (Iberia Parish)

65a

JUDGE

STATE OF LOUISIANA

PARISH OF IBERIA

AFFIDAVIT SUPPORTING SEARCH WARRANT

BEFORE ME, ROBERT E. JOHNSON Judge of the 16th Judicial District Court, Parish of Iberia State of Louisiana, personally appear(s) Chief Deputy James T. Desormeaux

who, being duly sworn by me, depose(s) and say(s) the following:

Probable cause exists for the issuance of a search warrant authorizing the search of the residence and surrounding premises of Elmo Patrick Sonnier, located on the Jefferson Island Road, Star Route B, further described as the first house on the left side of Louisiana Highway 675 just before the first railroad track when heading southwest. It is a white house, and is occupied by Gladys Horton, Helen Sonnier, Eddie Joseph Sonnier, and Elmo Patrick Sonnier;

where the following described item(s) (X) (are) believed to be: handcuffs, driver's license belonging to victims named below, firearms, clothing, footwear, ammunition, blue Dodge Dart automobile belonging to Elmo Patrick Sonnier.

The probable cause is based on the following:

On December 1, 1977, Eddie Joseph Sonnier confessed to your affiant that he and his brother, Elmo Patrick Sonnier, had murdered Loretta Bourque and David LeBlanc on November 5, 1977, that the clothi... used during the murders were in the above-described premises, as well as the vehicle used -- an early 1960's blue Dodge Dart automobile which contains handcuffs used in the crime. Other clothing and accessories used in the crime are believed to be on the premises.

1. 66a

Probable cause (continued)

The undersigned officer(s) request(s) a warrant to search the aforesaid residence of Elmo Patrick Sonnier and Eddie Joseph Sonnier described above for the item(s) specified in this affidavit.

It may become necessary to conduct the search during the nighttime or on Sunday or on a holiday, and affiant(s) request(s) that the warrant authorize a nighttime and Sunday search or a search on a holiday. (Delete reference to nighttime, Sunday or holiday search if not applicable.)

The lawful purpose or reason for the search is that the above-described item(s) (delete inapplicable reasons)

[redacted]

b. (Is) (Are) intended or used as the means of committing an offense.

c. May constitute evidence tending to prove the commission of an offense.

[redacted]

e. Other _____

Affiant(s):

_____

_____

SWORN TO AND SUBSCRIBED before me this 1st day of December, 1977.

_____
JUDGE

16TH JUDICIAL DISTRICT
COURT

PARISH OF [illegible]

RETURN OF SEARCH WARRANT

TO THE HONORABLE ROBERT L. JOHNSON, Judge, 16th Judicial District Court,

I hereby certify that I received a search warrant on the 1st day of December, 1977, at the hour of 4:00 pm, and that I executed the warrant on the 1st day of December, 1977, at the hour of 6:30 pm, and made a diligent search, as ordered by the warrant, and found and seized the following property:

See attached list

A copy of the search warrant and a receipt for the items seized were (left at) given to Helen Dennis

RESPECTFULLY SUBMITTED,

Major O'Neil Tyler

Sgt. Steve Davis

OFFICER(S)

Deliver at follows:

(a) Deliver the original affidavit, search warrant and the return (of the search warrant) to the District Attorney's Office.

(b) Keep one copy of each form for your department files.

(c) Give one copy of each form to the judge.

(d) Give one copy of return to judge after warrant is executed.

(e) When property is seized, give a receipt, describing the property in detail.

(f) Give a copy of the search warrant (not the affidavit) to the person whose property was searched.

BELOW IS A LIST OF THE ITEMS TAKEN DURING A SEARCH OF THE RESIDENCE OF ELMO PATRICK SONNIER, OF ST. RT. 3 BOX 246 , JEFFERSON ISLAND RD., ON THE 1ST DAY OF DECEMBER 1977 at approximately 6:30 pm. THE SEARCH WAS CONDUCT BY MAJOR O'NEIL TYLER, SGT. STEVE DAVIS, AND DEPUTIES DAVID BONIN AND FERD BOUDREAUX.

1- pair of H.W.C. stainless steel handcuffs made in Taiwan

1- box of .22 western super x rim fire cartridges.

1- american flag "76" collar insigna

1- sgt. stripes collar insigna

1- tear gas and holster

1- tear gas

1- Machette

1- silver clip w/bar and hook

1- night stick

1- medecine bottle with assorted green and white pills.

1- empty box of .22 super x rim fire cartridges

1- piece of leather with seven bullet loops containing 1-.32 cal. bullet and four .38 cal. bullets.

1- pair of brown work boots.

1- pair of black work boots.

1- yellow note pad

5- blue work shirts

3-blue work pants

1- green work shirts

1- green work pants

3- green jackets

1- green pants to slicker suit

1- blue dodge dart 77 la. lic. # 20X823

At 10:15 a.m. on Tuesday, December 6th, 1977, locksmith Norman DeHart came and unlocked the trunk of the 1963 blue Dodge Dart belonging to Elmo Patrick Sonnier, bearing 1977 Louisiana License plate 20X823.

Major Tyler, DeHart, and Blanc Segura were present when the trunk was opened. a piece of rope and a green briefcase was found in the trunk. In the briefcase were the following items:

1- rearview mirror

1- spelling tablet with the name Helen Grace Sonnier and Elmo Patrick Sonnier 8th grade on it.

1- black leather handcuff case.

1- set of keys with handcuff key and three other keys on a ring.

1- can of "OFF".

1- lincoln welding machine notepad.

1-red dateline theme book.

1- piece of cardboard with name Sonnier Elmo P., apt. 84 Evangeline circle.

1- cargill salt notebook.

1- Jo-de shipping recipt.

1- pocket holder with two pens and two pencils.

1- blue checkbook Teche bank in St. Martinville.

8- assorted pens and pencils.

1- allen wrench.

1- screwdriver with an ice pick on the end of it.

3- color phothographs. (a male subject appears to be handcuffed in one)

1- piece of paper- payroll tax deductions.

1- piece of paper-name angie on it-365-6532.

1- piece of paper- name Ben Menard -5-7221.

Respectfully submitted,

O'Neil Tyler

Major O'Neil Tyler

STATE OF LOUISIANA | 16TH JUDICIAL DISTRICT COURT

VERSUS NUMBER 27,383 | PARISH OF IBERIA

ELMO PATRICK SONNIER | STATE OF LOUISIANA

MOTION TO SUPPRESS EVIDENCE

NOW INTO COURT, comes defendant, ELMO PATRICK SONNIER, appearing herein through his court-appointed counsel, and moves to [illegible] for use as evidence herein all objects and property seized by agents of Iberia Parish Sheriff's office and/or any other law enforcement agency on or about the 1st day of December, 1977, on the grounds that said search and seizure was illegal and unconstitutional since said seizure was made pursuant to a search warrant issued on the basis of an Affidavit, which Affidavit 1) did not provide a sufficien factual basis and/or provide underlying circumstances from which a neutral and detached magistrate could have determined that the items sought to be seized were actually in or ever in the premises to be searched; 2) was based on hearsay information which had not been proven to be reliable; 3) was based on information which did not adequately indicate whether the affiant, and/or informant, had sufficient information to ever indicate that the items sought to be seized were in the location indicated; 4) was based on [illegible] sions rather than facts obtained from individuals in a position to state probable cause.

FURTHER, IT IS ALLEGED that the State of Louisiana will claim that permission to search the premises was given by Helen Sonnier and in such event, defendant claims that such search and seizure was illegal and unconstitutional since Helen Sonnier was not the owner of and have no legal authority to give permission to deputies of the Iberia Parish Sheriff's Department to search the areas actually searched.

WHEREFORE, defendant prays that the search and seizure was made in violation of defendant's constitutional guaranteed rights under Amendment Four (4) of the United States Constitution, as well as the Consitution of Louisiana, and jurisprudence thereto.

BY ATTORNEY FOR DEFENDANT

71a

DOCKET NUMBER 63293

****

S U P R E M E C O U R T

S T A T E O F L O U I S I A N A

****

STATE OF LOUISIANA

VS.

ELMO PATRICK SONNIER

****

NUMBER 27,383

ON THE CRIMINAL DOCKET OF THE 16TH JUDICIAL DISTRICT

COURT IN AND FOR THE PARISH OF IBERIA,

HONORABLE C. THOMAS BIENVENU, JR., TRIAL JUDGE

****

APPLICATION FOR RE-HEARING BY DEFENDANT - APPELLANT

AND

BRIEF BY DEFENDANT - APPELLANT

****

ALLEN A. McELROY, JR.
McELROY & RAMSEY, LTD.
P. O. Box 488
Berwick, LA 70342
(504) 384-8703

STEPHEN P. SHEA
ATTORNEY AT LAW
P. O. Box 2291
New Iberia, LA 70560
(318) 367-2596

REPRESENTING DEFENDANT-APPELLANT

APPLICATION FOR RE-HEARING

The petition of ELMO PATRICK SONNIER, defendant and appellant in the above entitled and numbered cause, respectfully represents that the judgment of this Honorable Court rendered on the 25th day of June, 1979, affirming the conviction and sentence of the Sixteenth Judicial District Court for the Parish of Iberia, State of Louisiana, is erroneous and contrary to the law and ... and is prejudicial to the applicant herein for the following reasons:

1.

The Court erred in finding no reversible error in Assignment of Error Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13.

WHEREFORE, ELMO PATRICK SONNIER prays that a re-hearing be granted in this cause and after due proceedings had the judgment rendered herein on the 25th day of June, 1979, be set aside and reversed and that there be judgment herein in favor of defendant-appellant reversing the decision of the Sixteenth Judicial District Court, Iberia Parish, Louisiana.

RESPECTFULLY SUBMITTED:

ALLEN A. McELROY, JR.
McELROY & RAMSEY, LTD.
P. O. Box 488
Berwick, LA 70342
(504) 384-8703

A F F I D A V I T

STATE OF LOUISIANA

PARISH OF ST. MARY

BEFORE ME, the undersigned authority, personally came and appeared ALLEN A. McELROY, JR., attorney for defendant-appellant, ELMO PATRICK SONNIER, who, being duly sworn and deposed did state:

That he has served a copy of the above application for re-hearing on Mr. Dracos Burke, Assistant District Attorney, Sixteenth Judicial District Court, Parish of Iberia, State of Louisiana, by placing a copy of same in the United States Mail, postage prepaid and addressed to him at the District Attorney's

Office, Iberia Parish, Iberia Parish Courthouse, New Iberia, Louisiana, on this

____ day of ____July____, 1979, at Berwick, St. Mary Parish, Louisiana.

_____

ALLEN A. McELROY, JR.

SWORN TO AND SUBSCRIBED before me,

on this _____ day of July, 1979.

_____

NOTARY PUBLIC

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BRIEF IN SUPPORT OF APPLICATION FOR RE-HEARING

As this matter has been fully briefed and argued before the Court, I will not unduly burden this Court with a lengthy statement of the case. The facts of the case are basically as indicated in the original opinion of this Court on June 25, 1979, and therefore no useful purpose would be sustained by further recitation of these facts.

ISSUES PRESENTED FOR RE-HEARING

ELMO PATRICK SONNIER claims that he has been denied due process and equal protection of the law, which is afforded him by the United States Constitution and the Louisiana Constitution, because of reversible error of the Sixteenth Judicial District Court, Parish of Iberia, State of Louisiana, all as more fully set forth in Assignment of Errors No. 1 - 13 previously filed in this matter.

ARGUMENT

ASSIGNMENT OF ERRORS NOS. 1 AND 3

Defendant claims that the trial judge as well as this Honorable Court has erred in refusing to grant a change of venue. This Honorable Court in refusing to find reversible error has basically held that although the publicity was extensive such was objective, factual, and non-inflammatory. Defendant would argue that there is no need to have inflammatory journalism in order to prevent the defendant from having a fair trial. Albeit inflammatory journalism may whip up public prejudice, the formulation of public opinion adverse to the interest of defendant may be based solely upon objective and factual journalism. Moreover, if the journalism is extensive, objective and thoroughly factual, such can create a lasting impression of guilt in the minds of prospective jurors. This lasting impression, in and of itself, would create a prejudice against the defendant, the prejudice being that he is guilty.

This fact is shown when you consider the prospective juror, Camille Brigante. Mr. Brigante was called as a prospective juror on the "dry run" voir dire held at the hearing of the change of venue. Upon questioning by defense counsel, Mr. Brigante candidly admitted he had formulated an opinion based

upon reading objective statements from the newspaper, which opinion was that the defendant was guilty. However, upon questioning by the judge, Mr. Brigante indicated that he could place this opinion out of his mind and give the defendant a fair and impartial trial. Nonetheless, several weeks later, Mr. Brigante was randomly selected as a prospective juror and thereto questioned on voir dire. Despite previous indications to the judge that he could be fair and Mr. Brigante once again, upon questioning by defense counsel, admitted that he had formulated an opinion of guilt. Once again, Mr. Brigante was so called rehabilitated by questioning from the judge. From a review of both the change of venue testimony and the voir dire of Mr. Brigante, it can only be reasonably concluded that he had formulated an opinion which opinion was based upon "evidence" read in the paper.

It was not so much that the publicity in this matter produced a prejudice in the minds of the public that has denied the defendant due process and equal protection of the law, but that the adverse publicity was so extensive and factual that the defendant was tried and convicted, in the minds of prospective jurors, before the trial in Open Court. The question is not then whether journalism has to be inflammatory in order to create a prejudice but whether the journalism in being so extensively objective and factual, that it has presented all, or almost all, of the evidence of guilt of the defendant. If such is the case, as in this case, it can only be reasonably concluded that the pub... already heard all of the evidence and the trial is merely a procedure which solidifies the first impression of guilt. STATE v. BELL, 315 So.2d 307 (LA, 1975) stands for the proposition that the defendant is entitled to a change of venue when for any reason the defendant cannot obtain a fair trial. It is respectfully submitted that the defendant does not need to show a concrete prejudice in the community but only that because of adverse publicity, impressions and influences on the minds of jurors have been made. When, as in this case, the publicity is such clearly adverse, extensively factual (and ultimately accurate) serves only to solidify and make lasting an impression of guilt on behalf of the defendant. Such has been clearly shown through the questioning of the prospective jurors on the "dry run" voir dire. The influence in the community that affected their

answers on voir dire is amply shown by the questioning of Camille Brigante. After reading the adverse publicity, Mr. Brigante formulated an impression of guilt. Although it is alleged that he was rehabilitated such rehabilitation is not reasonably substantiated. If Mr. Brigante had in fact been rehabilitated, then when he was called as a prospective juror at the time of the trial, he would not have been so candid in stating that he had formulated an opinion of [illegible] he truly had been rehabilitated, there would be no impression of guilt. However Mr. Brigante, after reviewing the adverse extensive publicity, had formulated a lasting impression adverse to the defendant. Thus, this Honorable Court must conclude that because of the adverse publicity there were influences in the community affecting the answers of the jurors in such a manner that the defendant could not obtain a fair trial in Iberia Parish.

ASSIGNMENT OF ERRORS NO. 2

In analyzing Assignment of Errors No. 2, this Honorable Court has correctly indicated that the burden is on the defendant to prove insanity at the time of the trial. However, the Court fails to appreciate the dilemma of appointed counsel in carrying such a burden when he is not provided adequate tools in which to do so.

In anticipation that insanity would be a defense, the undersigned counsel paid for a psychological evaluation. Contrary to the indications of this Court, this psychological evaluation was produced by agreement with the District Attorney's Office as evidence at the sanity commission hearing. Therefore, there was evidence before the Court which could reasonably lead to a finding that additional psychiatric testing was warranted in this matter.

In STATE v. HALEY, 353 So.2d 1011 (1978) this Court refused further psychiatric testing requested by the defendant. However, the facts in that case are distinguishable from those in the present case. In HALEY, two (2) psychiatrists had been appointed, and both had conducted thorough examinations. Further, both psychiatrists were of the opinion that HALEY was sane. The facts in the present case show that only one (1) psychiatrist was appointed to examine the defendant. Further, there is evidence, by way of the report of the psychologist retained by defense counsel, which would indicate that defendant

was suffering from a mental disease, which could possibly render him insane at the time of the commission of the offense.

It has repeatedly been held that an indigent defendant because of due process and equal protection of the law is constitutionally guaranteed the right to be represented by competent counsel. Applying this logic one step further, and assuming that the Court is correct that the defendant ... to prove his insanity, then it must also follow that defendant should be afforded, not on a discretionary basis, proper and competent medical experts. Such is especially important when the defendant, as in this case, has been determined to suffer from a mental disease or defect.

The due process and equal protection provisions of the United States Constitution and Louisiana Constitution are meant to provide equal standing before the law for all defendants, whether rich or poor. However, if a poor defendant is unable to retain proper medical authorities, then he has been denied equal protection under the law. Clearly the burden is on an indigent defendant to prove his insanity, but if this Court consistently refuses to provide such an indigent defendant with proper tools in which to carry his burden of proof then it is meaningless for such a defendant to raise an issue, such as insanity, when he knows he will have no means in which to prove same. In such a case, the indigent defendant would be denied an opportunity to raise the defense of insanity.

The request of the defendant in this matter, was not burdensome or unreasonable. The first request was just for additional psychiatric testing. At the most, such testing would costs the State FIVE HUNDRED ($ 500.00) DOLLARS. Further, such additional psychiatric testing would not require a continuance of the case. Is it therefore unreasonable for the defendant to make such a request when he is burdened with proving insanity?

ASSIGNMENT OF ERRORS NO. 7

This Honorable Court has erred in refusing to find reversible error in the trial judge failing to grant the challenge for cause of the prospective jurors, Flossie Berard and Camille Brigante. Certainly, the statements of

Flossie Berard, if accepted on her word alone, would not indicate that the challenge for cause should be granted. However, the test is whether it is reasonable to conclude that the relation of Mrs. Berard to various parties in this matter would influence her in arriving at a verdict. Mrs. Berard had close family ties with the victim and the prosecution. Certainly Mrs. Berard was an educated, intelligent and reasonably articulate individual. candidly knew that if she showed any impartiality she could not be chosen as a juror. The fact that she did not voice any preformulated opinions of guilt does not mean that it is reasonable to conclude that she was not influenced in her relationship with the victims and prosecution. The test, in this matter, is what is reasonable.

In STATE v. McINTYRE, 365 So.2d 1348 (LA 1979), this Honorable Court felt it reasonable to conclude that a former State Trooper could not render an impartial verdict. The Court closely scrutinized the relationship of the State Trooper with the prosecution and thereto reasonably concluded that such would influence the juror in arriving at the verdict. If this Court would also closely scrutinize the nature of the crime, the fact that the Court was held in Iberia Parish, and the closeness of Mrs. Berard to both the victim and the prosecution, only one reasonable conclusion can be made that being, the relationship of Mrs. Berard would influence her in arriving at a verdict.

The Court's refusal to grant a challenge for cause of Camille Brigante is clearly erroneous. It is to be remembered that Mr. Brigante was not only a prospective juror at the time of the trial, but also a prospective juror on "dry run" voir dire. When questioned by defense counsel, Mr. Brigante candidly admitted the formulation of an impression of guilt. However, when questioned by either the State or the judge, Mr. Brigante would become so-called rehabilitated. At page 104 of the trial transcript in the change of venue, Mr. Brigante stated "Well, to me, from what I heard, like he's guilty". At page 105, the following question and answer occurred:

> "Q: You indicated you feel he's guilty. Why do you feel he's guilty.
>
> A: From what they said on the paper."

Despite being rehabilitated after the above statements of guilt

illicited at the change of venue, Mr. Brigante once again reiterated his impression of guilt when called as a prospective juror at the time of the trial. The question then becomes; how many times can a prospective juror be rehabilitated before the court concludes that he cannot render an impartial verdict? If in fact Mr. Brigante had been rehabilitated, then he should have been rehabilitated after the "dry run" voir dire and there should have been no further need for rehabilitation. Once a juror has been rehabilitated and thereby becomes impartial, there should be no further need for rehabilitation. However, in the case at hand, Mr. Brigante needed rehabilitation on more than one occasion. And why did he need this rehabilitation? Mr. Brigante needed rehabilitation because, in truth and fact, he was never and could never be rehabilitated since he had formulated a lasting impression of guilt.

Accordingly, the challenge for cause of Mr. Brigante clearly should have been sustained since Mr. Brigante was not impartial because of the extensive factual publicity/he had formulated a lasting impression of guilt. This lasting impression of guilt, in the mind of this prospective juror, no matter what type of questioning by the judge cannot and would not have been put aside.

ASSIGNMENT OF ERRORS NO. 4
CONCERNING SENTENCE PORTION

Defendant claims that the trial judge erred in giving an improper instruction to the jury. This Honorable Court, in effect, has refused to find reversible error in the judge's ruling by alleging that there is no way of knowing what effect, if any, the charge had on the jury's verdict. However, such reasoning merely begs the question. The Court should first look to whether an improper instruction was given. If it is concluded that the instruction was improper then because of due process of law, the Court must find reversible error.

In analyzing the instruction given to the jury, it can clearly be shown that such instruction was improper. In the sentence portion of the trial, the jury can return only two (2) verdicts; that of either death or imprisonment in the State Penitentiary for life, without benefit of probation, parole, or suspension of sentence. Accordingly, any instruction of the judge should be

consistent with these verdicts. It follows logically that any instuction of the judge which would allude to the jury that further verdicts can be rendered is clearly improper.

Applying this reasoning to the instruction of the judge herein, it can only be concluded that it was an improper instruction. When the judge informed the jury that the defendant may be released on a work-release program, he was in effect reading out of the life sentence those provisions which indicate that a life sentence is to be without benefit of probation, parole, or suspension of sentence. This Court does not need to ascertain what effect, if any, this charge had on the jury's verdict. The Court must only look to the fact as to whether this instruction was consistent with the sentences to which the jury could return. This Honorable Court has indicated that it is reasonable to speculate that the jury wanted to know whether life meant "life". However, if the jury was to accept the words of the judge at face value, then life could not mean "life", but that life could mean a sentence wherein the defendant could be released before spending the rest of his life incarcerated.

The charge given by the judge in this matter was in and of itself a means to inform the jury that other verdicts besides that of death or imprisonment for life, without benefit of probation, parole, or suspension of sentence, could be rendered. Such is clearly contrary to Louisiana law and the dictates of the legislature in pronouncing the permissible verdicts on the sentencing portion of a first degree murder case.

CONCLUSION

In conclusion, it is respectfully requested that this Court grant the defendant, ELMO PATRICK SONNIER, a re-hearing herein to consider the aforementioned issues, and all other issues previously raised, as well as those issues not raised but which violates defendant's constitutional protected rights

RESPECTFULLY SUBMITTED:

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IN THE

SUPREME COURT OF LOUISIANA

NO. 80-K-1846

STATE OF LOUISIANA,

Plaintiff-Appellee

VERSUS

ELMO PATRICK SONNIER,

Defendant-Appellant

ON APPEAL FROM
THE SIXTEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. MARY,
HON. C. THOMAS BIENVENU, JR., JUDGE

APPLICATION FOR REHEARING

SUPREME COURT OF LOUISIANA
FILED
JUL - 6 1981
CLERK

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IN THE

SUPREME COURT OF LOUISIANA

NO. 80-K-1846

STATE OF LOUISIANA

VERSUS

ELMO PATRICK SONNIER

ON APPEAL FROM
THE SIXTEENTH JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. MARY,
HON. C. THOMAS BIENVENU, JR., JUDGE

APPLICATION FOR REHEARING

Defendant-Appellant Elmo Patrick Sonnier, through undersigned counsel, applies to the Court for a rehearing of his appeal, decided June 22, 1981, for the following reasons:

I.

The trial court erred in failing to exclude all witnesses from the courtroom during closing arguments, as requested by the defense because of the influence of the presence of these witnesses upon the jurors.

II.

This Court erred in failing to require that no mitigating circumstance be shown to exist, through some articulable standard of proof, prior to the recommendation of the death sentence. The lack of such a standard of proof renders the sentencing procedure arbitrary, and any sentence of death returned pursuant thereto unconstitutionally deficient.

III.

The selection of the defendant, being one of two

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accomplices to the same crime, to suffer the death penalty, was arbitrary and unjustified, in that the evidence does not demonstrate any greater culpability of this defendant than that of his accomplice who is not sentenced to death.

IV.

The failure to order a new sentencing hearing when one of several aggravating circumstances found by the jury is on appeal determined to be erroneous constitutes error, in that the denial of a new hearing is predicated upon the assumption by the appellate court that the jury would nonetheless have recommended the death penalty notwithstanding the insufficient and erroneous circumstance.

In so doing, the appellate court is creating and using a presumption clearly prejudicial per se to the accused, and substitutes its opinion on the facts for that of a jury.

The error is more prejudicial where, as in this case, the circumstance has emotional undertones: the "especially heinous, atrocious or cruel manner" in which the crime was committed, which calls for a subjective evaluation by the jury, and which evaluation is not immune to emotional argument.

V.

In the absence of some objective evidence presented at the guilt portion of trial of torture or the pitiless infliction of unnecessary physical pain upon the victim, the State should not be permitted to argue in the sentencing proceeding that the homicide was committed in an especially heinous, atrocious or cruel manner.

The lack of said evidence would invalidate the aggravating circumstance found pursuant thereto, and the defendant is prejudiced by argument presented to the jury on a subjective and emotional issue which dwells upon the allegedly grisly and gruesome details of the crime, when no finding thereof can be sustained.

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METAIRIE, LOUISIANA
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TELEPHONE [illegible]

VI.

The judicial construction of the aggravating circumstance of the creation of the risk of death or of great bodily harm to more than one person, to encompass all situations wherein more than one person is killed or injured, is unjustified by the wording of La. C.Cr.P. art. 905.4(d).

VII.

For the above reasons, the sentence of death imposed upon the defendant is in violation of Article 1, §§2 and 20 of the Louisiana Constitution, and of the Eighth and Fourteenth Amendments to the United States Constitution.

VIII.

Defendant-Appellant respectfully requests an extension of time to Friday, July 10, 1981, within which to file a brief in support of this application for rehearing, pursuant to Rule IX, Section 3.

WHEREFORE, defendant-appellant prays that this application for rehearing be granted, and that the sentence imposed upon defendant be vacated, and a new sentencing hearing ordered.

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STATE OF LOUISIANA | 16TH JUDICIAL DISTRICT COURT

VERSUS NUMBER | PARISH OF IBERIA

ELMO PATRICK SONNIER | STATE OF LOUISIANA

DEFENDANT'S SPECIAL REQUESTED JURY CHARGE NO. 3

Ladies and Gentlemen of the jury, I charge you that in your determination of punishment, you must make a determination that any aggravating circumstance has been proven to exist by competent evidence beyond a reasonable doubt. Further, in determining whether any mitigating circumstance has been proven to exist you must determine that such does exist unless such is disproved by the State of Louisiana by proof beyond a reasonable doubt. Thus, if the State of Louisiana fails in its proof of any aggravating circumstance, you are to return a sentence of life imprisonment. Further, if the State of Louisiana fails to disprove that any mitigating circumstance exists, then you are to return a sentence of life imprisonment.

JACKSON v. VIRGINIA, 61 L.ed 2d 560

RECEIVED AND FILED
MAR 24 1980
Patricia C. Hulsey
Deputy Clerk of Court

STATE OF LOUISIANA | 16TH JUDICIAL DISTRICT COURT

VERSUS NUMBER 106,918 | PARISH OF ST. MARY

ELMO PATRICK SONNIER | STATE OF LOUISIANA

MOTION FOR NEW TRIAL
AND OBJECTION TO DEATH SENTENCE

NOW INTO COURT through his undersigned court appointed counsel, comes defendant, ELMO PATRICK SONNIER, who would with respect represent:

1.

Defendant is anticipating being sentenced to death in accordance with the recommendations of the jury held in the above captioned matter on or about March 26, 1980.

2.

A new trial on the sentencing hearing should be granted since the decision of the jury is contrary to the law applicable and the evidence adduced.

3.

It is anticipated that by orders of this Court defendant will be sentenced to death.

4.

Defendant strenuously objects to said sentence inasmuch as it constitute cruel and unusual punishment, is excessive, not warranted under the circumstances, and therefore is contrary to the laws of the State of Louisiana, the Constitution of the State of Louisiana, the laws of the United States of America, and the Constitution of the United States of America.

5.

Defendant further objects to said imposition of the death sentence inasmuch as the jury impanelled in this matter has misapplied the law and the facts and has failed to take into consideration the mitigating circumstances of this matter.

6.

Defendant strenuously objects to the death penalty inasmuch as it constitutes denial of defendant's rights of equal protection under the law since the previous sentence of death of EDDIE JAMES SONNIER has been reduced to life

imprisonment, while the sentence of death to defendant, who played only a small and minor role, is attempting to be enforced.

WHEREFORE, defendant, ELMO PATRICK SONNIER, prays that this Honorable Court declare the imposition of the death sentence in this matter to be contrary to the law and evidence and therefore illegal, and additionally that this Court declare the imposition of the death penalty to be cruel and unusual punishment and therefore in violation of defendant's constitutional guaranteed rights; and in additionally that this Court declare the imposition of the death penalty to be a denial of the equal protection rights of defendant.

BY COURT APPOINTED ATTORNEY

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RECEIVED AND FILED
April 11, 1985
Patricia S. Hebert
Deputy Clerk of Court

WEDNESDAY, MARCH 26, 1980

Court met this day, the HONORABLE C. THOMAS BIENVENU, JR., JUDGE, presiding.

Minutes of the previous session are approved and signed.

106,918 STATE OF LOUISIANA VS. ELMO PATRICK SONNIER
INDICTMENT: FIRST DEGREE MURDER - 2 COUNTS - (CONVICTED OF SAID CRIMES IN IBERIA PARISH ON APRIL 14, 1978)

PRESENT: Mr. Dracos D. Burke, Ass't District Attorney
Mr. Allen McElroy, Attorney for the defendant
Mr. Elmo Patrick Sonnier, the defendant

NOT PRESENT: Mr. James B. Supple, Attorney for the defendant

IN RE: HEARING ON THE SENTENCE TO BE IMPOSED ON THE DEFENDANT

Court resumed session at 9:05 A. M. The defendant was present in open Court together with his attorney. The jury was brought into open Court, and the State and Defense waived the polling of the jury.

Evidence was adduced on behalf of the Defense until the hour of 12:10 P. M. Noon recess was called. The jurors were retired from open Court.

At the hour of 1:45 P. M. Court resumed session. The jury was returned into open Court, and the State and Defense waived the polling of the jury.

Evidence was further adduced and completed on behalf of the Defense, and the Defense rests. Evidence in rebuttal was adduced and completed on behalf of the State. Recess was called. The jury was retired.

After the recess and out of the presence of the jury, the Attorney for the defendant made a motion to keep the rule of sequestration of the witnesses in effect during the closing arguments and the Court's charge to the jury. For oral reasons assigned, the Court denied the defendant's motion.

MARCH 26, 1980, continued

The jury was returned into open Court, and the State and Defense waived the polling of the jury.

Closing statement on behalf of the State was presented by Mr. Dracos Burke, Ass't District Attorney, and on behalf of the Defense by Mr. Allen McElroy, Attorney for the defendant. Argument in rebuttal was given by Mr. Burke.

The Court charged the jurors in accordance with the law. The alternate jurors were discharged with the thanks of the Court for doing their civic duty. At the hour of 7:08 P. M., the jury retired for its deliberations.

Out of the presence of the of the jury, the Attorney for the defendant stated for the record that he had presented three special charges for the Court to include in its charge to the jury. After conferences held in chambers, the Court agreed to use charge number one, but refused to include charges two and three. The Attorney for the defendant respectfully objects to the exclusion of these two charges.

At the hour of 9:14 P. M., the jury announced through its foreman, Dale B. Clements, that a verdict had been reached. The defendant was present in open Court together with his attorney and the District Attorney. The jury was returned into open Court. The State and Defense waived the polling of the jury. The verdict was handed to the Court. The Court ordered the Clerk to read the verdict. The verdict is as follows:

RECOMMENDATION AS TO FIRST-DEGREE MURDER OF LORETTA BOURQUE

DEATH

Having found the below listed statutory aggravating circumstance or circumstances and, after

consideration of the mitigating circumstances, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

1. The offender was engaged in the perpetration of aggravated kidnapping, aggravated burglary, and armed robbery.
2. The offender knowingly created a risk of death or great bodily harm to more than one person.
3. The offense was committed in an especially heinous, atrocious, or cruel manner.

March 26, 1980 s/ Dale Clements
FOREMAN

RECOMMENDATION AS TO FIRST-DEGREE MURDER OF DAVID LEBLANC

DEATH

Having found the below listed statutory aggravating circumstance or circumstances and, after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstance or circumstances found:

1. The offender was engaged in the perpetration of aggravated kidnapping, aggravated burglary, and armed robbery.
2. The offender knowingly created a risk of death or great bodily harm to more than one person.
3. The offense was commited in an especially heinous, atrocious or cruel manner.

March 26, 1980 s/ Dale Clements
FOREMAN

MARCH 26, 1980, continued

On motion of the Attorney for the defendant, the Court ordered the jurors polled. Each juror was asked "Is this your verdict?" to which all answered affirmatively. The Court ordered the verdict recorded.

The Court further ordered April 11, 1980 at 10:00 A. M. fixed as the date for imposition of sentence in this case.

The Court discharged the jurors with the thanks of the Court for performing their civic duty.

The defendant was remanded into custody.

Court then adjourned.

s/ C. Thomas Bienvenu, Jr. JUDGE
C. THOMAS BIENVENU, JR., JUDGE
16TH JUDICIAL DISTRICT COURT

s/ Patricia C. Herbert
DEPUTY AND MINUTE CLERK

FRIDAY, APRIL 11, 1980

Court met this day, the HONORABLE C. THOMAS BIENVENU, JR., JUDGE, presiding.

Minutes of the previous session are approved and signed.

106,018 STATE OF LOUISIANA VS. ELMO PATRICK SONNIER
INDICTMENT: FIRST DEGREE MURDER (2 COUNTS) - (CONVICTED OF SAID CRIMES IN IBERIA PARISH ON APRIL 14, 1978)

PRESENT: Mr. Dracos J. Burke, Ass't District Attorney
Mr. Allen McElroy, Attorney for the defendant
Mr. Elmo Patrick Sonnier, the defendant

IN RE: IMPOSITION OF SENTENCE

On motion of the District Attorney, this case was called on the docket for imposition of sentence as previously fixed for this day.

The defendant was present in open Court together with his attorney.

A Motion for a New Trial and Objection to the Death Sentence was made by the Attorney for the defendant. Argument was presented by the Attorney for the defendant and the District Attorney. The State and Defense stipulate that the arguments presented this day will serve as all evidence which would be presented at a motion for a new trial.

The matter was then submitted to the Court. For oral reasons assigned, the Court denied the motion for a new trial and denied the objection to the death penalty. The Attorney for the defendant respectfully objects to the ruling of the Court.

The defendant then waived all legal delays and requested immediate sentence.

APRIL 11, 1980, continued

The Court inquired whether the defendant or his attorney had anything to say before sentence is imposed. They replied in the negative.

The Court sentenced the defendant as follows:

Under R. S. 14:30, First Degree Murder, of the State of Louisiana, it is the sentence of this Court that Elmo Patrick Sonnier, be put to death on both counts against him and for that purpose he is hereby committed to the Louisiana State Department of Corrections for execution of said sentence. The Court further ordered that the sentences run consecutively.

An oral motion for appeal was made by the Attorney for the defendant and granted by the Court. The Court further made it returnable on June 10, 1980, set May 21, 1980 as the deadline for filing of assignments of error, and fixed May 31, 1980 as the deadline for filing of the Court's per curiam.

The defendant was remanded into custody.

Court then adjourned.

s/ C. Thomas Bienvenu, Jr. JUDGE
C. THOMAS BIENVENU, JR., JUDGE
16TH JUDICIAL DISTRICT COURT

s/ Patricia C. Herbert
DEPUTY AND MINUTE CLERK

STATE OF LOUISIANA

PARISH OF ST. MARY

I, BENNY A. BLAKEMAN, Clerk of Court, Sixteenth Judicial District Court, St. Mary Parish, Louisiana do hereby certify that the foregoing is a true and correct Abstract of the Minute Entries in the proceeding entitled STATE OF LOUISIANA VS. ELMO PATRICK SONNIER, NO. 106,918 (ST. MARY) and NO. 27,383 (IBERIA) of the Criminal Minute Book 26 on file and of record in my office and on file in the Iberia Parish Clerk of Court's office.

IN EVIDENCE WHEREOF, witness my official signature and the impress of the seal of my office, this day of July, A. D., 1980, at Franklin, St. Mary Parish, Louisiana.

Benny A. Blakeman

BENNY A. BLAKEMAN, CLERK OF COURT

PARISH OF ST. MARY, STATE OF LOUISIANA

NOV 23 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-5698

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

ELMO PATRICK SONNIER,

Petitioner

vs.

STATE OF LOUISIANA,

Respondent

OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF LOUISIANA

WILLIAM J. GUSTE, JR.
Attorney General
State of Louisiana

BERNARD E. BOUDREAUX, JR.
District Attorney
Sixteenth Judicial District
New Iberia, Louisiana

By: DRACOS D. BURKE
Assistant District Attorney
Counsel of Record
P. O. Box 7
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1-318-364-4586

QUESTIONS PRESENTED

I

Whether the state courts erred in holding that no constitutional violation occurred during a post-seizure search of the trunk and interior of a blue Dodge Dart automobile when the locked automobile itself had already been properly seized pursuant to a valid search warrant, following which a written consent to search the interior of said automobile was obtained from a woman bearing defendant's name and purporting to be his lawful wife, even though, in fact, there had been no lawful marriage?

II

Whether the Louisiana Supreme Court erred in affirming the death penalty after setting aside the jury's finding that the murders were "especially heinous and atrocious", although affirming the jury's findings of four other statutory aggravating cricumstances; viz., that the murders were committed while in the perpetration of aggravated kidnapping, aggravated burglary, and armed robbery, and created risk of death or great bodily harm to more than one person?

III

Whether the trial court in a capital case erred by failing sua sponte to provide detailed instructions to the jury concerning the effect and weight to be given to mitigating circumstances to be considered during the sentencing phase?

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STATEMENT OF THE CASE

1) Course of Proceedings and Disposition in State Courts.

The defendant herein, Elmo Patrick Sonnier, white male, age 27, was indicted jointly with his younger brother, Eddie James Sonnier, age 21, by an Iberia Parish Grand Jury on December 16, 1977. The two brothers were jointly indicted in a single indictment containing two separate counts. The first count alleged the first degree murder of Loretta Ann Bourque; the second count alleged the first degree murder of David LeBlanc--both crimes occurring on November 5, 1977.

Following a number of pre-trial motions, all of which are reflected in the record of trial, Elmo Patrick Sonnier withdrew an initial insanity plea and entered a plea of not guilty. The indictment was severed and prosecution proceeded against Elmo Patrick Sonnier first.

On April 15, 1978, the jury found defendant guilty as charged and recommended sentences of death on each of the two counts of first degree murder.

Sentences of death on each of the two counts of first degree murder were imposed on April 25, 1978 by the trial judge.

Upon appellate review, the Louisiana Supreme Court initially affirmed both the convictions and the sentence. Upon a rehearing, however, the Louisiana Supreme Court found error in the trial judge's instructions to the jury during the sentencing phase. The convictions were again affirmed, but the case was remanded to the trial court for a new hearing on the sentencing phase only before a new jury. State v. Elmo Patrick Sonnier, 379 So.2d 1336 (1979).

After a change of venue to St. Mary Parish, on March 26, 1980 the new jury returned recommendations of death on each count of first degree murder. The new jury found the existence of all five aggravating circumstances suggested by the State.

On April 11, 1980, the trial judge again sentenced defendant to death on each count of murder.

Upon appellate review, the Louisiana Supreme Court set aside one of the aggravating circumstances, but affirmed the remaining four aggravating circumstances and the death sentences. State v. Elmo Patrick Sonnier, 402 So.2d 650 (1981).

2) Synopsis of the facts of the case.

The evidence, as it developed at trial, revealed that on the night of November 4, 1977, two teenagers, David LeBlanc and Loretta Ann Bourque, had parked in a remote area of St. Martin Parish following a high school football game. They were accosted at about one a.m. by the two Sonnier brothers, Eddie James and Elmo Patrick, posing as police officers. The youngsters were handcuffed together at rifle-point and forced into the back seat of their own vehicle. The Sonnier brothers, with Elmo Patrick driving their victims' car, then drove some twenty-one miles through back roads to a remote oil field road in Iberia Parish, an area known to the defendant Elmo Patrick. The two youngsters were ordered out of the car and the boy was kept handcuffed while the girl was taken a short distance away where she was raped by both defendants.

Both Elmo Patrick Sonnier and his brother Eddie James testified for the defense, and each attempted to shift the blame

to the other for raping the girl and for actually firing the fatal shots. However, in response to defense counsel's questions on direct examination, Eddie James Sonnier did admit that he had convinced the girl to let him have intercourse with her after his brother, Elmo Patrick, had done so, this being a condition whereby the youngsters were to be released unharmed. Upon completion of the rapes the two youngsters were ordered to lie face down on the ground. According to his pre-trial confessions, Elmo Patrick Sonnier then fired three shots at close range into the head of each victim. (Transcript p. 1365-68, 1381, 1337-1339, 1387-1392, Exs. S-33, 35, 37) At trial, Elmo Patrick Sonnier recanted and testified that his pre-trial confessions (taped, oral and written) had been false and that he had taken the blame for doing the actual shooting in order to cover-up for his younger brother. Eddie Sonnier, called as defense witness, reiterated what both he and Elmo had said during their pre-trial confessions--viz., that Elmo Patrick Sonnier had fired all six fatal shots. Medical testimony was to the effect that any one of the six shots would have resulted in instantaneous death of the victim.

Prior to the second hearing on Elmo Patrick Sonnier's sentence, Eddie James Sonnier had himself been tried, convicted, and sentenced to death. Upon appeal, however, Eddie's death sentences had been reduced to life imprisonment. Freed from the threat of the death penalty, Eddie appeared as a defense witness at Elmo Patrick's rehearing on the sentence. Contrary to his previous testimony at his brother's trial on the merits, Eddie now assumed full responsibility for the killings, attempting to exonerate his brother Elmo Patrick. The defendant himself

now testified similarly to Eddie's new testimony. Both were impeached by their many previous statements to the contrary. Apparently, this new jury disbelieved this new testimony, since it too returned recommendations of death.

SUMMARY OF ARGUMENT

Respondent's ARGUMENT which follows is divided into three sections, each directed toward a specific QUESTION PRESENTED on page i of this brief.

1. Petitioner's objection to the search of the interior of the Dodge automobile after the vehicle had been properly seized under a valid search warrant is totally without merit. The car was properly seized as an instrumentality of the two murders, and careful examination of its exterior and interior after seizure was perfectly reasonable. Additionally, the police had obtained a valid written consent from Helen Sonnier, who purported to be defendant's wife. The fact that she was not legally married to defendant has no bearing on her apparent and actual authority to permit a search of property in her custody. Finally, nothing of critical significance was found during the search in question; so even assuming error, it was harmless.

2. The jury found five aggravating circumstances to support its recommendation for the death penalty. In view of Godfrey v. Georgia, ____ U. S. _____ , 100 S. Ct. 1759, 64 L.Ed. 2d 398 (1980), the Louisiana Supreme Court was constrained to set aside that aggravating circumstance that characterized defendant's crimes as "heinous and atrocious". This still left four perfectly valid aggravating circumstances to support the death penalty, when the statute requires only a single aggravating circumstance.

The characterization of defendant's crimes as "heinous and atrocious" did not result in the introduction of any improper evidence, nor did it prejudice defendant in any way. Therefore, setting aside that single aggravating circumstance should have no bearing upon the validity of the death penalty.

3. Defendant attacks the trial judge's instructions to the jury as being inadequate on the subject of weighing the mitigating factors. Not only was this alleged inadequacy not raised at trial, it was not briefed on appeal to the Louisiana Supreme Court, and should not be the basis for an application for a writ of certiorari to this Honorable Court. Tacon v. Arizona, 99 S.Ct. 998, 410 U.S. 351, 35 L.Ed. 2d 346 (1973). If this Honorable Court should choose to examine this issue, it is submitted that the instructions were fully adequate to guide the jurors in their important task.

ARGUMENT

I. The search of the Dodge automobile.

By focusing on the "common-law" relationship between defendant and Helen Sonnier, who gave the written consent to search the vehicle, defendant's application for the writ tends to distort the factual situation that confronted the Louisiana courts.

It should be noted at the outset here that defendant's original brief before the Louisiana Supreme Court abandoned any argument concerning the validity of the search warrant and the consent to search, but simply alleged that certain items not listed on the search warrant had been improperly seized during the subsequent search. Nevertheless, this brief will refer to all aspects of the issue under discussion.

The searches and seizures in question were based upon a search warrant (reproduced in defendant's petition at page 66a) and upon Helen Sonnier's written consent to search the entire premises and the automobile, such written consent having been given without knowledge that the officers also held a valid search warrant (Transcript p. 473, 491).

The search warrant itself orders the search of defendant's residence "and surrounding premises" and authorizes the seizure of a list of items, including an "early 1960's blue Dodge Dart automobile belonging to Elmo Patrick Sonnier" (Transcript p. 96, Ex. S-2). It follows that all items seized from the premises--including the Dodge Dart parked in the yard -- were properly acquired under the authority of a valid search warrant. In United States v. Napoli, 580 F.2d 1198 (5th Cir. 1976), cert. den. 97 S. Ct. 316, an authorization to search "premises" was held to extend to a vehicle on the premises.

The police having lawfully seized the Dodge Dart in its entirety as an instrumentality of the two murders, it would be absurd to require a second warrant simply to open the vehicle and examine its contents especially since the warrant authorized a search of "the premises". In Cooper v. California, 87 S. Ct. 788, 386 U.S. 58 (1967), this Honorable Court recognized that "lawful custody of an automobile does not of itself dispense with constitutional requirement of searches thereafter made of it." The Court went on, however, to point out that the reason for and the nature of the custody may constitutionally justify the search. The test is not whether it would have been reasonable to procure a second search warrant, but whether the subsequent search of the vehicle already lawfully seized by police was reasonable. As this Honorable Court said in Cooper, supra, "we cannot hold unreasonable under the Fourth Amendment, the search of a car validly held by officers for use as evidence" (in the present case, as an instrumentality of the two murders).

Even apart from the search warrant that authorized search of "the premises" and seizure of the blue Dodge Dart, the prosecution had the voluntary written consent of Helen Sonnier, who purported to be defendant's wife. She was in control of the entire premises, including the vehicle, and the officers had no reason to suspect that she was somehow excluded from custody of the vehicle at her doorstep. It is not unusual that a husband should have the keys to the family car on his person. In any event, the factual determination by the trial judge that Helen Sonnier did, in fact, have joint control over the premises, including the vehicle, is entitled to great weight on appeal. State v. Bartley, 329 So. 2d 431, 433 (1976). The Bartley case is also authority for the Louisiana rule that a "common-law"

marital relationship does not invalidate consent, the question of consent to search being a factual one for the trial judge.

It should be noted that the Louisiana Supreme Court disposed of the entire issue by simply declaring that "we have also carefully considered defendant's assignments of error Nos. 4...and find that none of these assignments of error present reversible error, nor do they any involve legal issues not governed by well established principles of law." State v. Elmo Patrick Sonnier, 379 So.2d 1336, 1356 (1980).

Assuming, solely for the purposes of this argument, that both searches of the Dodge Dart's interior somehow were invalid, it is submitted that no real harm to the defendant ensued. The only items offered and admitted into evidence that were taken from the automobile were a small brief case (S-25), a handcuff case (S-26), keys (S-27), and a red tablet with defendant's name on it (S-28). The briefcase (S-25) itself was of no significance except as a container for the other items. The handcuffs themselves (S-24), properly seized from the house, had already been admitted into evidence (Transcript 1284-1285). The red tablet with defendant's name on it (S-28) would establish defendant's connection with the Dodge Dart, but this had already been done more effectively by testimony that the automobile was parked next to his residence (Transcript p. 1280), and by defendant's confession (Ex. S-33), in which he admitted the ownership of the Dodge Dart. Thus, it is apparent from the record, that, even before the defense case was presented at trial (and during which all of the State's allegations concerning ownership of the foregoing items were confirmed), the introduction of State's Exhibits S-25 through S-28 was entirely cumulative. So even assuming error, it was harmless error. The

evidence of defendant's guilt is overwhelming. Not only did the jury have before it written and taped confessions to the murders, it had evidence of how defendant had re-enacted the murders in the presence of investigating officers. Additionally, the scientific evidence and the testimony of defendant's own brother, an accomplice and eye-witness to the murders, eliminated every possible doubt as to defendant's guilt of the two murders for which he was on trial. Harrington v. California, 395 U.S. 285, 89 S.Ct. 1720 (1969).

In Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497 (1977), this Honorable Court, in considering the problem of harmless error, said:

> "The other evidence of guilt presented at trial, moreover, was substantial to a degree that would negate any possibility of actual prejudice resulting to the respondent from the admission of the inculpatory statement." 433 U.S. at p. 92

There is no reasonable possibility that the evidence complained of might have contributed to the conviction. Schneble v. Florida, 405 U.S. 427, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972).

Defendant has failed to show that error was committed here, and, if committed, that it was prejudicial in the slightest. United States v. Lipscomb, 435 F.2d 795 (5th Cir. 1970) cert. den. 91 S.Ct. 1213, reh. den. 91 S.Ct. 1635.

II. The effect of setting aside one aggravating circumstance.

At the rehearing on the sentencing phase of the trial, the jury unanimously found the existence of five aggravating circumstances. Upon appeal, the Louisiana Supreme Court set aside the jury's finding that the murders had been committed in "an especially heinous, atrocious, or cruel manner". State v. Elmo Patrick Sonnier, 402 So.2d 650 (1981). This action was based upon the recent decision by the United States Supreme Court in Godfrey v. Georgia, _____ U.S. _____ , 100 S.Ct. 1759, 64 L.Ed 398 (1980), requiring detailed instructions to the jury on a proper and narrow interpretation of this particular aggravating circumstance. In the absence of such instruction in the present case, the Louisiana Supreme Court felt constrained to set aside the jury's finding that the two murders had been "heinous, atrocious, and cruel." The remaining four aggravating circumstances and the death penalty were affirmed by a unanimous court.

Defendant now asserts in his brief that the deletion of one of the five aggravating circumstances found by the jury demands that there be a second rehearing on the sentence. He refers to Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), wherein the Court of Appeals vacated a death sentence because one of several aggravating circumstances was set aside upon appeal. That case is presently before this Honorable Court sub nomine Zant v. Stephens, No. 81-89.

The State of Louisiana respectfully submits that the factual situation in Stephens v. Zant differs considerably from the present case, which should be easily and logically disposed of in favor of the State of Louisiana.

In Stephens, supra, the trial jury's consideration of an aggravating circumstance later held inadmissible on appeal may have caused the jury to be made aware of certain prejudicial information which otherwise may never have reached the jury. The impact of that information upon the sentencing decision may indeed be worthy of consideration.

In the present case, however, only one of five aggravating circumstances was set aside and there were no significant mitigating circumstances. The single aggravating circumstance set aside by the Louisiana Supreme Court on appeal did not concern a factual determination which, if erroneous, might have misled the jury, (e.g., that the victims were police officers, or that the killings were for profit.) Nor was otherwise inadmissible evidence presented to the jury. The aggravating circumstance that was set aside here was simply the jury's characterization of the defendant's conduct with reference to the crimes charged. All of this conduct was properly before the jury as evidence of the crimes themselves. Assuming that the jury erred in mislabelling the conduct as "heinous and atrocious", that error did not change the evidence nor did it introduce an element of prejudice into the proceedings. The jurors' collective judgment of defendant's conduct and the punishment merited thereby would have been exactly the same had they not been asked to characterize his conduct while recommending an appropriate penalty.

Under the circumstances of this particular case, any error in labelling defendant's conduct as "heinous and atrocious" (assuming this to have been an error), could not have had the slightest impact upon the jury's recommendation for the death penalty. Wainwright v. Sykes, supra. The recommendation for the death penalty was not "influenced by passion, prejudice or any other arbitrary factor."

The United States Court of Appeals, for the Fifth Circuit recently considered much the same problem on a habeas corpus petition in Williams v. Blackburn, _____ F.2d _____, June 18, 1981; holding inter alia that only one aggravating circumstance was necessary to uphold the death penalty, it being of no significance that another finding of "heinous and atrocious" circumstances had to be set aside. It is interesting to note that the same case, sub nomine Williams v. Louisiana, _____ U.S. _____ , 101 S.Ct. 899, 66 L.Ed.2d 828 (1981) had been denied certiorari by the United States Supreme Court during the direct appellate processes.

III. The adequacy of the trial court's instructions.

This particular issue was never raised in the courts below, except perhaps obliquely through a requested defense instruction (see page 86 of defendant's brief), which was rejected by the trial judge and found palpably erroneous by the appellate court (State v. Sonnier, at page 50a of defendant's brief).

Certainly it is the trial court's duty to explain the law to the jury, but when an instruction is neither challenged nor requested, the trial court should not be reversed except for plain error in giving or omitting instructions. United States v. Wentland, 582 F. 2d 1022, (5th Circ. 1978) cert. den. 99 S.Ct. 105 6. The mere submission of a requested instruction does not satisfy the requirement, necessary for preserving the objection for review, that the defendant indicate specifically why the court's instructions are erroneous and what should be done to conform such instructions to the law.

In the present case, defendant did not object to the instructions given at trial, but now attacks them as failing to provide the jury with "guidance as to the finding and effect of a mitigating circumstance." The exact instruction given on this matter by the trial judge is set out at page 12 of defendant's brief.

Defendant's brief seizes upon the language of Proffitt v. Florida, 428 U.S. 242, 248-249, 96 S.Ct. 2960, 2965 (1976) which refers to "weighing" the aggravating circumstances against the mitigating circumstances. Defendant suggests that the Florida procedures approved by this Honorable Court in Proffitt, supra, are somehow more precise and conducive to due process than the Louisiana terminology wherein the jury was instructed to "consider"

a specific list of mitigating circumstances as well as "to consider any other relevant mitigating circumstances".

The State of Louisiana respectfully submits that there are some things that cannot be reduced to precise mathematical equations. The difference between the Florida statute approved in Proffitt, supra, and the trial court's instructions in this case is basically one of semantics not of principle. The overridingly important fact in this case is that the instructions here, taken as a whole, informed the jury that it did not have to impose the death penalty, even if an aggravating circumstance were found. The jury was further told that it was required to consider a list of specifically named mitigating circumstances, and was authorized to consider "any other relevant mitigating circumstances." The existence vel non of any aggravating or mitigating circumstances was left to the good judgment of the jury, subject, of course, to appellate review.

The State of Louisiana respectfully submits that the jury instructions on mitigating circumstances, taken as a whole (and to which defense counsel did not object), Wainwright v. Sykes, supra, fully and fairly explained the jury's responsibilities concerning its sentence recommendation.

See also Williams v. Blackburn, supra, on the adequacy of instructions.

CONCLUSION

The first and third QUESTIONS PRESENTED raise no substantial issue not already decided by this Honorable Court. The trial court and the Louisiana Supreme Court correctly applied well-established principles of constitutional law to the factual circumstances of this particular case.

The second QUESTION PRESENTED concerns the effect of setting aside one of five aggravating circumstances found by the jury in support of the death penalty. Although never expressly decided by this Honorable Court, it is respectfully submitted that Respondent's Argument herein compels the conclusion that, under the facts of this case, certiorari should be denied. Recognizing that denial of certiorari is not necessarily legally significant, Respondent does note, however, that this Honorable Court has previously denied certiorari under an almost identical situation in Williams v. Louisiana, supra.

It is respectfully submitted that the state courts below fully considered and correctly applied existing federal constitutional law to the facts of this case. It if further respectfully submitted that petitioner's application for the writ of certiorari should be denied.

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